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CALCUTTA UNIVERSITY TAGORE LAW LECTURE
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THE GENERAL PRINCIPLES OF HINDU JURISPRUDENCE

VOLUME ONE

BY

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Edited and Annotated from original source-books

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DR PRIYANATH SEN

A Short Life Sketch*

Priyanath Sen was the second son of Babu Dinanath Sen Sarkar§, a member of a Vaidya family of great respectability in Eastern Bengal. He was born on Sunday, the 2nd February, 1873 (the day of the Saraswati Puja), in village Japsa in the District of Faridpur, in the ancestral family dwelling house which has now been washed away by the erratic Padma. From a very early age, he showed signs of uncommon intelligence, and his father, who had been himself a teacher§ by profession and a Sanskrit scholar of some attainments, did all he could with his limited means to impart a sound education to the boy. Priyanath passed the Middle English Examination from the school of his native village, and by his special profeciency in English won the prize awarded by Raja Surja Kumar Roy of Rajbari. He then joined the Dacca Collegiate School, from which institution he passed the Entrance Examination of the Calcutta University in 1889 and obtained a first grade junior scholarship. He next came to the metropolis and joined the Presidency College. At the F.A. Examination of 1891 he headed the list of successful candidates and carried off the Duff Scholarship for science, as also the Gwalior Gold Medal. He passed the B.A. Examination of 1893 with first class Honours in Sanskrit and second class Honours in Philosophy. His relative position

* Reprinted (by kind permission) from the Calcutta Law Journal, 10 C.L.J. Vol. 37-3[illegible].

§ Dinanath Sen Sarkar was not a teacher by profession. He was a landlord and a scholar in Sanskrit. He was sixth, and Priyanath seventh, descendent of Ramananda Sen Sarkar, Accountant of Nawab Sarfaraz Khan at Purnea. The surname Sarkar was thus earned by Ramananda for his service and was used by his decendents till Dinanath Sen and his brothers and cousins. Ramananda had purchased extensive zamindari for his family in East Bengal, later demarcated as the districts of Dacca, Faridpur, Barisal and Noakhali. Ramananda Sen established the *Patāleśwar Śiva*, one of the famous Śivas at Benares. The lane by this Siva temple is still known as *Ramananda Sarkar's Haveli.*—Publisher.

amongst all the candidates of the year was first, and he obtained the Burdwan scholarship and the Eshan scholarship, each of Rs. 50 per month. He was also awarded the Radhakanta gold medal for proficiency in Sanskrit. At the M.A. Degree Examination in 1894, he was placed first in the first class in Philosophy and obtained the University gold medal and prize. Meanwhile, he had been invited by the University to be a candidate for the Government of India scholarship tenable in England, but he declined the offer on account of the opposition of his mother to whom he was always deeply devoted. In 1896 he passed the B.L. Examination in the first division, and having served his articles of clarkship with Babu Baikuthanath Das, was enrolled as a Vakil of the High Court on the 7th September 1897. About this time Rai Jatindranath Chowdhury of Taki offered through the Bangiya Sahitya Parisad, a prize of Rs. 500/- for the best essay in Bengali on Advaitavāda. Priyanath had studied Vedanta Philosophy critically from the original sources, and at the request of his father, competed for the prize which was eagerly sought after by Pundits who had specially studied the Vedanta for years. The prize was equally divided between him and a well-known teacher of Vedanta Philosophy, Pundit Durgacharan Vedānta Sānkhyatīrtha. His essay named Advaitavāda-vicāra, which was subsequently published in Dacca in August, 1897, shows great acuteness of argument and clearness of presentation. In 1899, Priyanath won the Premchand Roychand studentship, the Blue Ribbon of the University as also the Mcuat Medal. In February, 1903, Priyanath submitted to the University his thesis on the Philosophy of Vedanta as required by the regulations for the studentship. It was examined by Mahamahopadhyay Mahes Chandra Nyayaratna and Babu Kalicharan Banerji who reported "that it bore ample evidence of special investigation and was in particular a thoughtful contribution to Vedantic Apologeties." It 1904 Priyanath passed the examination for Honurs in Law, and on the strength of a thesis on the Interpretation of Negative Precepts of Hindu Law, he was admitted in 1905 to the Degree of Doctor of Law. In August 1908, the Senate appointed him Tagore Professor of Law, and the subject he chose for his lectures was The General Principles

of Hindu Jurisprudence of which he had made a special study in original Sanskrit. He then submitted to the University a complete manuscript copy of the lectures, but did not live to deliver them, as he died on Monday, the 18th October, 1909. Since 1907 he had been a member of the Faculty of Law and of the Board of Studies in Law of the University, and he had on several occasions acted as one of the examiners for the B.L. Examination.

From the establishment of the Calcutta Law Journal he had been one of its editors and took great interest in the success of the undertaking. In the first volume *(p 9n,)* he contributed a paper on the Interpretation of Promise which attracted the notice of Sir Frederick Pollock and was commented upon in Law Quarterly Review Vol. XXI, p 219 as an indication 'that the subtlety of Hindu Lawyers is amply capable of finding a new field in the common Law.' To the third volume he contributed (*p.* 1*n*) a paper on Acceptance of an offer by Post. The fourth volume (*pp.* 21*n*, 27*n*, 35*n*, 63*n*, 75*n*,) contains his thesis on the Interpretation of Negative Precepts in Hindu Law. These papers are all characterised by great learning and acuteness, and are models of contribution on legal subjects.

Dr. Priyanath Sen, at the time of his death, had been a member of the profession for twelve years, and had earned the reputation of being an able and erudite lawyer. After the usual struggle of the junior, he had latterly been gaining a sure footing in the ranks of the leaders, and if he had been spared, a place in the very front rank of the profession or a seat on the Judicial Bench world have been only a question of time. He was scrupulously fair as an advocate, and was held in high regard by all members of the profession who had the pleasure to know him. His early death is an irreparable loss to the country, and we are not likely to get for years to come another man of his type—the modest and accomplished scholar of unblemished character.

PUBLISHERS NOTE

After long sixtytwo years the first seven lectures of this valuable treatise on Hindu Jurisprudence are being published as volume one. The remaining seven lectures will be shortly published as the second volume with additions and alterations on Hindu Law since the first publication of the book, by an eminent authority on the subject along with notes from original source-books and reference books by the present editor. Appendices covering texts, footnotes and notes on additions and alterations on Hindu Law since the first publication of the book will also be appended in the second volume.

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THE GENERAL PRINCIPLES OF HINDU JURISPRUDENCE

EDITORIAL APOLOGIA

From time immemorial the Aryans in their revealed texts have given expression to a concept of the supreme transcendental law or cosmic order governing the universe and even the gods. The term coined for the purpose is *ṛta*, which occurs several times in the *Ṛgveda*.[1]

Gradually however the word that was used mostly is *dharma*, the meaning of which also has undergone changes so much so that it is difficult indeed to indicate the exact connotation of the word.[2]

There are several śāstric attempts to define *Dharma*. Jaimini's definition is : *Codanālakṣaṇo'rtho dharmaḥ*. (*Mīmāṃsādarśana*, 1.1.2). It means 'a desirable goal or result that is indicated by injunctive (Vedic) passages'. The rule in the *Vaiśeṣikasūtra*—'Yato' bhyudayaniḥśreyasiddhiḥ sa dharmaḥ' suggests that from which result happiness and final beatitude. There are several attempts in different texts and an analysis of the definitions points to the fact that in course of time spiritual and mystic ideas tended to be associated with the word.

In the context of the king as the administrator of justice however the word attains the significance of natural justice and ethical principle. Thus when it is ordained that a king is to protect his subjects according to the princples of *Dharma*, 'kṣitiṁ dharmeṇa pālayet'—it is intended that the king in the administration of justice should follow strictly the ethical

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1. Vide R. V, 1.68.2 ; 1.105.12, 1.136.2 ; X.190.1.

For discussion on the importance of this term as also of *vrata* and *dharma*, vide Kane, *History of Dharmaśāstra*, Vol. V, part 1, pp. 19-21.

Vide also Journal of the Bombay Branch of the Royal Asiatic Society, Vol. XXIX, (1954), pp. 1-28. Also note the view expressed by Berolzheimer in his 'The world's legal philosophies' (translated by Jastrow, New York, 1929).

2. Kane in his *History of Dharmaśāstra*, Vol. 1, pp. 1-6 has very detailed discussion of this term. More informative paper on this point is by Dr. R. C. Hazra, on 'On the early meaning and scope of the word dharma' in *Our Heritage*, Vol. II, pt. 1, pp. 15-36.

principles. The Mahābhāratic statements as recorded below may be explained in that light :

'Sarve dharmā rājadharmapradhānāḥ'. *Śāntiparva*, 63-29

Evaṃ dharmān rājadharmeṣu sarvān/
Sarvāvasthaṃ sampralīnān nibodhata// Ibid. 63.25

In the *Śāntiparva* the king has been declared to be the maker of his age (rājaiva yugam ucyate. 91.6) and the idea has been elaborated in the *Śukranītisāra* :

'Yugapravartako rājā dharmādharmapraśikṣaṇāt'.

It has very appropriately been stated there that if there be any violation of the *Dharmic* principle it is the offence on the part of the king only :

Yugānāṃ na prajānāṃ na doṣaḥ kintu nṛpasya tu.
IV.1.60

On the other side of the picture Nārada speaks of seven merits to be obtained by a king ruling his subjects according to the principles of *Dharma* :

Dharmeṇoddharato rājño vyavahārān kṛtātmanaḥ/
Sambhavanti guṇāḥ sapta sapta vahner ivārciṣaḥ//
Nārada, 1.32.

Dharmaś cārthaś ca kīrtiś ca lokapaṃktir upagrahaḥ/
Prajābhyo bahumānaṃ ca svarge sthānaṃ ca śāśvatam//
Ibid, 1.33.

Nārada, following Manu, (VIII. 12, 14) personifies the administration of justice as *Dharma* :

Yatra dharmo hy adharmeṇa satyaṃ yatrānṛtena ca/
Hanyate prekṣamāṇānāṃ hatās tatra sabhāsadaḥ// 111.8.
Viddho dharmo hy adharmeṇa sabhāṃ yatropatiṣṭhate/
Na cāsya śalyaṃ kṛntanti viddhās tatra sabhāsadaḥ// III.9.

Because of the great importance accorded to *Dharma* in respect of administration of justice, the Śāstrakaras rightly designate the court as *Dharmāsana* :

(Tasmād *dharmāsanaṃ* prāpaya rājā vigatamatsaraḥ/
Samaḥ syāt sarvabhūteṣu vibhrad vaivasvataṃ vratam//
Nārada, 1.34),

(vide also Manu, VIII. 23) and *Dharmasthāna*

(Dharmasthānaṃ prācyāṃ diśi tac cāgnyudakaiḥ samavetaṃ syāt. Śaṃkha quoted in the *Smṛticandrikā*.)

Kātyāyana has the designation *Dharmādhikaraṇa* for the court of justice and there is attempt to justify such appellation. According to him 'that place, where the decision of the truth of the plaint (lit. the cause or root of dispute) is carried on by a consideration of the (rules of the) sacred law, is called the *Dharmādhikaraṇa*' :

Dharmaśāstravicāreṇa mūlasāravivecanam/
Yatrādhikriyate sthāne dharmādhikaraṇaṃ hi tat//
Kāt. 52.

Pratāparudra in his *Sarasvatīvilāsa* explains the position of *Dharmaśāstra* according to which adjudications are supposed to be made :

Yatra sthāne āveditavyatattvaniṣkarṣaḥ dharmaśāstravicāreṇa nirṇetṛbhiḥ kriyate iti dharmasthānam. Asyaiva dharmādhikaraṇam iti nāmāntaram. p. 63.

The four-footed *Vyavahāra* has the constituent as *Dharma* as pointed out by Nārada :

Dharmaś ca vyavahāraś ca caritraṃ rājaśāsanam/
Catuspād vyavhāro'yam uttaraḥ pūrvabādhakaḥ// 1.10.

In continuation Nārada observes :

Tatra satye sthito dharmo vyavahāras tu sākṣiṣu/
Caritraṃ pustakaraṇe rājājñāyāṃ tu śāsanam// 1.11.

Kātyāyana through an illustration has explained the nature of a decision through *Dharma*. What is intended is that the decision is by moral law (*Dharma*) where the offender confesses his offence and the person offended gets redress of his grievance :

Doṣakārī tu kartṛtvaṃ dhanasvāmī svakaṃ dhanam/
Vivāde prāpnuyād yatra dharmeṇaiva sa nirṇayaḥ//
Kat.35.

Mitramiśra in his *Vyavahāraprakāśa* has explained in details the implication of the verse of Kātyāyana thus :

Vākpāruṣyasteyādidoṣakārī vyavahārapravartanam antareṇaivānutāpādinā dharmābhimukho'dharmād bhītaś ca svasya doṣakartṛtvaṃ svayam abhyupaiti. Yatra dhanasvāmī dharmābhimukhād adharmabhīroś cādhamarṇāder vyavahāraṃ vinaiva svakīyaṃ dhanam āpnoti, tatrobhayatra sampratipattyuttara iti yāvat. Dharmeṇaiva nirṇayaḥ. Ata evoktaṃ—'tatra satye sthito dharma' iti. — p. 7

The two expressions '*vivādapada*' and '*vyavahārapada*' deserve special treatment here. The word *Vyavahāra* has different meanings in the form of 'transaction or dealing' (*Āp. Dh. Sū*, II.7 16.17.) ; 'dispute or law suit' (*Manu*, VIII.1 ; Yāj. II.1) ; 'legal capacity to enter into transactions' (*Gau. Dh. Sū*, X.48) ; 'the means of deciding a matter (as in *Gau. Dh. Sū*, XI.19 : tasya vyavahāro vedo dharmaśāstrāṇy aṅgāni) and finally in the accepted sense of 'law-suit or dispute in court' and legal procedure. Inscriptional records show that the term was much in use. The expression '*viyohālasamatā*' (*vyavahārasamatā*) finds place in the *Delhi-Topra Pillar Edict* No. 1 of Aśoka (Corpus 1.1.Vol.I. p. 123) and the *Kharavela's Hāthigumphā Inscription* (E.I. Vol. XX. p.79) has the word '*vyavahāravidhi*.' We have in the *Mahāvagga*, 1.40.3 and *Cullavagga*, VI.4.9 the use of the expression '*vohārika-mahāmatta*' (vyavahārika-mahāmātra—minister of justice). In the *Āpastamba-dharma-sūtra*, II.11.29.5 and in *Nārada*, 1.5. *Vivāda* stands for 'law-suit.'

The expression *Vyavahāra* has been defined by Kātyāyana in two ways. In one of them he takes to the etymological sense. What he points out is that *Vyavahāra* consists in removing of doubts :

Vi nānārthe'va sandehe haraṇaṃ hāra ucyate/
Nānāsandehaharaṇāt vyavahāra iti smṛtaḥ//*Kāt*, 26.

In the other definition Kātyāyana states that a dispute arising out of the allegation in a court is designated as *Vyavahāra*. To state exactly, 'when the ramifications of right conduct, that together are called *Dharma* and that can be established only with effort, have been violated, the dispute (in a law court between plaintiff and defendant) which springs from what is desired to be proved (such as a debt), is said to be *Vyavahāra*.'[1]

Prayatnasādhye vicchinne dharmākhye nyāyavistatre/
Sādhyamūlas tu yo vādo vyavahāraḥ sa ucyate//*Kāt*. 25

The words of Kātyāyana are couched in vague terms and therefore the digest-writers often have explained it in their own way by taking resort to ingenious interpretation. Thus in the *Smṛticandrikā* Devaṇabhaṭṭa explains it as : 'Samyagbhāṣa-

1. Vide here the exhaustive notes by Kane in his *Kātyāyanasmṛtisāroddhāra* (Bombay, 1933), 122.

ṇāhiṃsananimittam ityādiprayatnasādhye dharmākhye padārthe lobhadveṣādivaśād vicchinne sati yatra ṛṇādānādau sādhana-prāptyartham samayadharmādau ca paradharmavarjanārtham nyāyavistaraṇam kriyate, tatra sādhyamūlo yo manuṣyāṇām vivādaḥ sa vyavahāra ucyate.'

Vyavahārakāṇḍa, pt. 1 (Mysore, 1914). pp. 1-2.

In support Devaṇaphaṭṭa quotes the text of Hārīta :

Svadhanasya yathā prāptiḥ paradharmasya varjanam/
Nyāyena kriyate yatra vyavahāras sa ucyate// p. 2.

He goes on to state : Dhanāpahnavavivādaḥ pāṣaṇḍādīnām svadharmasamayavivādo'pi vyavahāra iti arthaḥ.

From an analysis of the different statements of Yājnavalkya, Bṛhaspati and others Devaṇabhaṭṭa finally speaks of *Vyavahāra* thus :

'Evañ cāṣṭādaśavidhaviṣayāṇām anyatamaviṣayako vivādo vyavahāra iti Yājñavalkyādivacanānām ārthiko'-rthaḥ pratyetavyaḥ. p. 3

Mitramiśra in his *Vyavahāraprakāśa* observes :

Vihitācaraṇaniṣiddhavarajanādiprayatnasādhye dharmākhye vastuni vicchinne viplute satīti vyavahārahetur uktaḥ, dharmādharmaviplavasyaiva vyavahārahetutvāt. pp. 3-4.

In support he quotes the text of Nārada and Bṛhaspati thus[1] :

(Manuḥ prajāpatir yasmin kāle rājyam abūbhujat/)
Dharmaikatānāḥ puruṣās tadāsan satyavādinaḥ//
Tadā na vyavahāro'bhū na dveṣo nāpi matsaraḥ/
Naṣṭe dharme manuṣyeṣu vyavahāraḥ pravartate//

Nārada, 1-2.

Bṛhaspati :

Dharmapradhānāḥ puruṣāḥ pūrvam āsann ahiṃsakāḥ/
Lobhadveṣābhibhūtānām vyavahāraḥ pravartate// 1.1.

For other interpretations of *Vyavahāra* done in the light of the the definition of Kātyāyana, vide *Vyavahāraprakāśa*, pp. 3-4.

Vide also the view of Vijñāneśvara, who defines *Vyavahāra* as a statement (with reference to a particular point of dispute) in opposition to that of another :

Anyavirodhena svātmasambandhitayā kathanam vyavahāraḥ.

on Yāj, II.1.

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1. The *Nāradasmṛti* edited by Jolly (Calcutta, 1885) has different reading.

Vyavahārapada is also treated as synonymous with *Vivādapada* (vide *Nārada*, IV.1 : ......dattāpradānikaṃ nāma tad *vivādapadaṃ* smṛtam. Vide also V.1. : Aśuśrūṣābhupetyeti *vivādapadam* ucyate.) (Vide also *Arthaśāstra* of Kauṭilya where in the third *Adhikaraṇa* we get acquainted with the word *vivādapada* in the title of the section. For other uses of the word in the same sense vide *Arthaśāstra*, III.16.38 ; IV.7.17 ; 11.1.14). It is defined by Yājñavalkya in the following way :

Smṛtyācāravyapetena mārgeṇādharṣitaḥ paraiḥ/
Āvedayati ced rājñe vyavahārapadaṃ hi tat// Yāj.II.5.

In other words, that is to be treated as *Vyavahārpada* where a person by being transgressed by others in a manner opposed to the rules of the *Smṛti* and convention (*ācāra*) makes an appeal to the king (head of the state) for the redress of his grievances :

Vijñāneśvara explains the position thus :

Dharmaśāstrasamācāraviruddhena mārgeṇa parair ādharṣito' bhibhūto yad rājñe prāḍvivākāya vā āvedayati vijñāpayati ced yadi, tad āvedyamānaṃ vyavahārapadaṃ pratijñottarasaṃśayahetuparāmarsapramāṇanirṇayaprayojanātmako vyavahāraḥ tasya padaṃ viṣayaḥ. Tasya cedaṃ sāmānyalakṣaṇam.

These *Vyavahārapadas* have been declared in general by Manu as of eighteen types (VIII.4-8) and following him Nārada mentions them as :

Ṛṇādānaṃ hy upanidhiḥ sambhūyotthānam eva ca/
Dattasya punar ādānam aśuśrūṣābhyupetya ca//
Vetanasyānapakarma tathaivāsvāmivikrayaḥ/
Vikrīyāsampradānaṃ ca krītvānuśaya eva ca//
Samayasyānapākarma vivādaḥ kṣetrajas tathā/
Strīpuṃsayoś ca sambandho dāyabhāgo'tha sāhasam//
Vākpāruṣyaṃ tathaivoktaṃ daṇḍapāruṣyam eva ca/
Dyūtaṃ prakīrṇakaṃ caivety aṣṭādaśapadaḥ smṛtaḥ//
Nārada : 1.16-19.

That the list is not final is evident from the statement of Manu:

Eṣu sthāneṣu bhūyiṣṭhaṃ vivādaṃ caratāṃ nṛṇām/
Dharmaṃ śāśvatam āśritya kuryāt kāryavinirṇayam//
Manu, VIII.8.

Vide here the comments of Medhātithi :

Bhūyiṣṭhagrahaṇaṃ prādhānyakhyāpanārtham. Anye'pi vyavahārahetavaḥ santi. yathā.......

Nārada is more clear in his statement thus :

Eṣām eva prabhedo'nyaḥ dvātriṃśadadhikaṃ śatam/
Kriyābhedān manuṣyāṇāṃ śataśākho nigadyate// 1.20

In the commentary on the *Nāradasmṛti* by Asahāya, retouched by Kalyāṇabhaṭṭa there is elaborate discussion on this classification.[1] Nārada's mention of four-footed *Vyavahāra* has the support of Kauṭilya, who in his *Arthaśāstra* has almost identical verses :

Dharmaś ca vyavahāraś ca caritraṃ rājaśāsanam/
Vivādārthaś catuṣpādaḥ paścimaḥ pūrvabādhakaḥ//
Tatra satye sthito dharmo vyavahāras tu sākṣiṣu/
Caritraṃ saṃgrahe puṃsāṃ rājñām ājñā tu śāsanam//
IV.1.

Bṛhaspati in more clear terms speaks of these four as means of arriving at decision in a law-suit (nirṇayahetutvam) :

Dharmeṇa vyavahāreṇa caritreṇa nṛpājñayā/
Catuḥprakāro'bhihitaḥ sandigdhe'rthe vinirṇayaḥ//

Vyavahāra (decision by judicial proof) consists in the case where the adjudicators utilise some principles of *Dharmaśāstra* for the purpose of deciding the causes of the litigants. We have thus a definition of the same from Kātyāyana :

Smṛtiśāstraṃ tu yat kiñ cit prathitaṃ dharmasādhakaiḥ/
Kāryāṇāṃ nirṇayārthe tu vyavahāraḥ smṛto hi saḥ// 36.

Mitramiśra explains the implication of the verse thus :

Dharmasādhaiḥ sabhyaiḥ smṛtiśāstraṃ sākṣyādikriyāpratyāyakam arthipratyarthinoḥ kāryanirṇayārthaṃ prathitaṃ prakhyāpitaṃ yatra catuspādvyavahārapravartanena nirnayakāraṇam iti yāvat. Tatra vyavahāro nirṇayahetur ity arthaḥ. Ata evoktaṃ vyavahāras tu sākṣiṣu iti. *Vyavahāraprakāśa*, p. 7.

It has appropriately been stated that the word 'sākṣi' in the text of Nārada should be taken as illustrative (Sākṣigrahaṇaṃ pramāṇopalakṣaṇam).

1. Vide his commentary on *Nārada*, I.20-25.

The third one, namely, *Caritra*, type of *Vyavahāra* offers an interesting aspect of adjudication. A vast territory as India is, it is quite likely that the *Śāstras* may cover only a considerable portion by their rules and regulations. The *Śāstrakāras* were prudent enough not to leave those portions beyond the range of the the Śāstras. What they did was the recognition of the local customs and conventions. Of course the imprimatur of legality was imparted to the practices of the people of unimpeachable character. Thus we have from Hārīta (as quoted in Mādhava's commentary on *Parāśara*. Sm pt.l.p.144) the definition of *Sadācāra* as :

Sādhavaḥ kṣīṇadoṣāḥ syuḥ sacchabdaḥ sadhuvācakaḥ/
Teṣām ācaraṇaṃ yat tu sa sadācāra ucyate//

It has been held in the *Gṛhya* text of Āśvalāyana that the customs and conventions of cities and villages are of various types and in matters relating to marriage they are to be followed :

Atha khalūccāvacā janapadadharmā grāmadharmāś ca, tān vivāhe pratīyāt.

Āpastamba who is apparently of puritanic disposition has the directive that according to some whatever has not been covered by his text should be learnt from (elderly) women as also from members of all castes :

Strībhyaḥ sarvavarṇebhyaś ca dharmaśeṣān pratīyād ity eke. *Āp. D.S*, II.11,29.15.

On a subject of religious importance as the *Śrāddha* itself, Baudhāyana directs that the usages of the people are to be followed :

Śeṣakriyāyāṃ loko'nuroddhavyaḥ. *Bau. Dh.S*, 1.5.13.

Sadācāra has been defined by Manu (II.18) and its authoritative character in respective of *Dharma* has been recognised by him in the statement :

Vedaḥ smṛtiḥ sadācāraḥ svasya ca priyam ātmanaḥ/
Etac caturvidham āhuḥ sākṣād dharmasya lakṣaṇam//
II.6.

While speaking about the authoritativeness of the customs and conventions both Gautama and Vasiṣṭha state that they

are to be treated as authoritative only when they do not go against the dictates of the Vedic sciptures :

Deśajātikuladharmāś cāmnārjair aviruddhāḥ pramāṇam.

G.D.S. XI.20.

Deśadharmajātidharmakuladharmān śrutyabhāvād abravīn Manuḥ. *Vas.* I.17.

It is Manu who has directed the conquerer to lend recognition to the lawful customs of the country conquered :

Jātijanapadān dharmān śreṇīdharmāṃś ca dharmavit/
Samīkṣya kuladharmāṃś ca svadharmaṁ pratipādayet//

VIII.41

Vide here the observations of Medhātithi in elucidation of this verse.

Yājñavalkya has identical direction :

Yasmin deśe ya ācāro vyavahāro kulasthitiḥ/
Tathaiva paripālyo'sau yadā vaśam upāgataḥ// 1.343

Kauṭilya in his *Arthaśāstra* has observations of the same nature :

Deśasya jātyā saṃghasya dharmo grāmasya vāpi yaḥ/
Ucitas tasya tenaiva dāyadharmaṃ prakalpayet//

Arthaśāstra, III.7.

We have also from Bṛhaspati not only directive to the king regarding due recognition of the custom and conventions of countries, but also some specific illustrations relating to peculiar conventions of certain teritories. (Bṛh. Sm, I. 126-130). They are interesting from social point of view. The author of the *Madanaratnapradīpa* has pertinent observations regarding the steps to be adopted where these practices are resorted to even when they are not in consonance with the Śāstric texts :

Yat tu smṛtyantareṣu etatkarmakaraṇe prāyaścittadaṇḍasmaraṇaṃ tad etat vacanānupāttadeśaviṣayam.

Mitramiśra however is more methodical and rational in his approach in declaring that in such a case punishment from the head of the state should not follow, but the expiatory measures are to be adopted :

Vayaṁ tu prajākṣobhādidṛṣṭadoṣakathanād rājñā tatra daṇḍo na kārya eva. Prāscittābhāvas tu vyavahāraviṣayaḥ.

Vyavahāraprakāśa. p. 22.

Kātyāyana specifically has gone to the extent of defining *Deśadharma* and *Kuladharma* :

Yasya deśasya yo dharmaḥ pravṛttaḥ sārvakālikaḥ/
Śrutismṛtyavirodhena deśadṛṣṭaḥ sa ucyate// 46
Gotrasthitis tu yā teṣāṁ kramād āyāti dharmataḥ/
Kuladharmaṁ tu taṁ prāhuḥ pālayet taṁ tathaiva tu// 85

The *Caritra* variety of *Vyavahāra*, as defined by Kātyāyana refers to the practices which may or may not be in consonance with the directives of the *Dharmaśāstra*, but which are followed as such on the ground that they are invariable usages of the country :

Yad yad ācaryate yena dharmyaṁ vādharmyam eva ca/
Deśasyācaraṇān nityaṁ caritraṁ tat prakīrtitam// 37.

Vyāsa also has the same line of approach when *Caritra* has been spoken of as usages which have been established from ages past :

Deśasthitiḥ pūrvakṛtā caritraṁ samudāhṛtam. *Vyāsa*, 3.[1]

In the *Nasik Inscription* No. 12 (Epigraphia Indica, Vol. VIII. p. 82), we have the expression 'phalakavāre caritrīkaroti', which according to Mm. Kane appears to convey the same sense.

In one of the verses of Nārada we come across the term *Caritra*, where it seems to stand for law or custom. Thus we have :

Sthityarthaṁ pṛthivīpālaiś caritraviṣayāḥ kṛtāḥ.
Nārada, Prakīrṇaka,

which means that 'it is for the establishment of order that various laws have been proclaimed by the kings'.

The *Smṛticandrikā* records a verse (of Bṛhaspati ?) where it has been held that when a sentence is passed according to the inference (to be drawn from circumstantial evidence) it is termed (decision based on) custom. When it is passed according to local usages, it is termed another sort (of a decision based on custom) by the learned in law.' :

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1. Vide *Vyāsasmṛti* (Vyavahāra-section) Ed. B. K. Ghosh, (Calcutta, 1944), published earlier in *Studia Indo-Iranica,* Ehrenga be für Wilhelm Geiger, (Munich, 1931) ; and in Zietschrift für Indogie und Iranistik, Band 9, Heft, 1, (Leipzig, 1932).

Anumānena nirṇītaṁ caritram iti kathayate/
Deśasthityā dvitīyas tu śāstravidbhir udāhṛtaḥ//
Vya. Sec. p. 23.

Devaṇabhaṭṭa has suggested such cases as when a person is caught with firebrand in his hand : Anumānam ulkāhastādi liṅgam. p. 23.

Nārada explains *Caritra* as 'Caritraṁ pustakaraṇe' (I.11) and Devaṇabhaṭṭa explains it as documentation or putting it in writing :

Pustakaraṇaṁ lekhyam. *Smṛticandrikā*, p. 25.

The meaning appears to be that the usages attain validity if they are recorded as such (by the king). Mitramiśra makes mention of the different readings and interpretations of the term. According to Mādhava the reading is '*caritraṁ tu svīkaraṇe*' and it has been explained that usages become the rule of decision when they are accepted as such.

Tatra mādhavīye 'caritraṁ tu svīkaraṇe' iti pāṭhaṁ likhitvā deśācāraś caritraṁ tatsvīkāre tad eva nirṇayahetur iti vyākhyātam.' *Vyavahāraprakāśa*, p. 7.

Caṇḍeśvara's interpretation has also been recorded in the following way :

'pustaṁ pañjikety arthaḥ. Tatkaraṇam adhikaraṇaṁ yasyeti vyākṛtam.

Mitramisra does not concur with this view :

Tad ruḍhihīnād vacanāntarāsambādāc ca heyam. p. 7.

Devaṇabhaṭṭa refers to a text of Pitāmaha where *Caritra* has been described in the following way :

Yad yad ācarati śreṣṭho dharmyam adharmyam eva vā/
Kulādideśācaraṇāc caritraṁ tat prakīrtitam//
Grāmagoṣṭhapuraśreṇīsārthasenānivāsinām/
Vyavahāraś caritreṇa nirṇetavyo bṛhaspatiḥ//
Q. in *Sm. C*, *Vyavahārakāṇḍa*, p. 58.

Rājaśāsana (royal edict) has been defined by Kātyāyana as one where the king establishes as *dharma* which does not come in direct conflict either with the Śāstric precepts or with the usages of the country :

Nyāyaśāstrāvirodhena deśadṛṣṭes tathaiva ca/
Yaṁ dharmaṁ sthāpayed rājā nyāyyaṁ tad rājaśāsanam//
Kāt, 38.

Devaṇabhaṭṭa in his exposition of this verse of Kātyāyana has laid stress on the point of the application of the king's intellect :

Asyāyam arthaḥ : mānāntarāviruddhaḥ rājabuddhimātraparikalpito nirṇayo rājaśāsanam ity ucyate. Sm. c. p. 22.

Each of these four has been spoken of by Bṛhaspati as having two varieties. They have been illustrated by him thus :

Ekaiko dvividhaḥ proktaḥ kriyābhedān manīṣibhiḥ/ 9.2.
Samyag vicārya kāryaṁ tu yuktyā saṁparikalpitam//
Parīkṣitaṁ ca śapathaiḥ sa jñeyo dharmanirṇayaḥ// 9.3.
Prativādī prapadyeta yatra dharmasya nirṇayaḥ/
Divyair vā śodhitas samyak nirṇayaḥ sa mudāhṛtaḥ// 9.4.

(This has been explained in the *Smṛticandrikā* in the following lines : Saha tattvānusaraṇena kṛtaḥ prathamo dharmākhyaḥ nirṇayaḥ. Vinā tattvānusaraṇaṁ satyottareṇa vā divyapramāṇena vā kṛto dvitīyaḥ ity arthah. p. 22).

Nārada while mentioning the four varieties of *Vyavahāra*, observes that those mentioned later are to supersede those mentioned earlier (Uttaraḥ pūrvabādhakaḥ. 1.10). In the text of Kātyāyana the point has been elaborated further. Thus it has been stated that *Vyavahāra* overrules *Dharma* in the case where reliance is made on reasoning and where the trial by ordeal is avoided. This will not be operative otherwise :

Yuktiyuktaṁ tu kāryaṁ syāt divyaṁ yatra vivarjitam/
Dharmas tu vyavahāreṇa bādhyate tatra nānyathā//Kāt, 39.

Kātyāyana by way of explanation goes to state that the king should make it a point not to disregard the fixed rules of conduct among those who belong to *Pratiloma* castes (in short, the progeny of the combination where a girl of higher caste marries a male of the lower caste, is designated as *Pratiloma*, for which vide *Manu*, X. 11-41) and those who live in the forts (i.e. inaccessible mountain regions), even if those rules of conduct directly go against the directives of the *Śāstra* :

Pratilomaprasūteṣu tathā durganivāsiṣu/
Viruddhaṁ niyataṁ prāhus taṁ dharmaṁ na vicālayet//
Kāt. 40

Accordingly when the king delivers a judgement in accordance

with such customary law *Vyavahāra* becomes overruled by *Caritra* :

Nirṇayaṁ tu yadā kuryāt tena dharmeṇa pārthivaḥ/
Vyavahāraś caritreṇa tadā tenaiva bādhyate// Kāt, 41

We have from Bṛhaspati directive of identical import in the verse :

Deśasthityānumānena naigamānumatena ca/
Kriyate nirṇayas tatra vyavahāras tu bādhyate// 1.20.
Q. in Sm. C, p. 25.

Kātyāyana refers to the case where the command of the king overrules *Caritra*. What he states is that whatever customary practice is considered by the king as directly opposed to the precepts of the *Śāstra*, he overrules the same through the application of his own command :

Viruddhaṁ nyāyato yat tu caritraṁ kalpyate nṛpaiḥ/
Evaṁ tatra nirasyeta caritraṁ tu nṛpājñayā// Kāt, 42.

It has further been stated that each succeeding one (out of the four) when possessed of these characteristics overrules (each preceding one) ; where each succeeding one overrules preceding one in other circumstances, justice is destroyed :

Anena vidhinā yuktaṁ bādhakaṁ yad yaduttaram/
Anyathābādhanaṁ yatra tatra dharmo vihanyate// Kāt, 43.

Devaṇabhaṭṭa in his *Smṛticandrikā* has taken pains to explain the cases of overrulings. Thus he refers to overruling in cases of *Caritra* thus :

Yadā punaḥ paradārābhigamanaṁ kṛtam anena sākṣino vidyante iti kaś cid ābhirādi kenacid abhiyuktaḥ brūte— satyam etat sākṣibhāṣitaṁ tathāpi nāhaṃ daṇḍyaḥ caritrabalāt mayaitat kṛtam ; niveśitaṃ ca pustake rājñā tad iti caritreṇa vyavahāro bādhyate, vyavahārataḥ prāptasya daṇḍasya caritrato nivṛttatvāt. Yuktaṃ cātra caritreṇa bādhanam :

Grāmagoṣṭhapuraśreṇī sārthasenānivāsinām/
Vyavahāraś caritreṇa nirṇetavyo bṛhaspatiḥ//
Sm. C, p. 24.

In this context it is not quite out of the point to make reference to the statement of Nārada regarding different characteristics one way or other on *Vyavahāra*. Thus he speaks of it

as having four means (*sādhana*), namely, *Sān a*, *Dāna*, *Bheda* and *Daṇḍa* :

Sāmādyupāyasādhyatvāt catuḥsādhana ucyate/ 1.12.

The *Smṛticandrikā* explains rather vaguely : Vipratipannārthipratyarthinos sāmādyupāyasādhyatvād ity abhiprāyah. p. 25.

It has been described as *Caturhita* because *Vyavahāra* is conducive to the welfare of the members belonging to the four classes :

Caturṇām āśramāṇāṃ ca rakṣaṇāt sa caturhitaḥ. 1.12.

It is rightly called *Caturvyāpī* (affecting directly four persons) because its effects go to four, namely, the disputants, the witnesses, the members of the assembly sitting as adjudicators and the king himself. All these four directly or indirectly are to share the religious merits or demerits by such act, as rightly pointed out by Devaṇabhaṭṭa :

Samyag asamyak dṛṣṭo dharmādharmaphalena kartrādīn pādaśo vyāpnotīty arthaḥ. *Smṛticandrikā*, p. 25.

Nārada's statement is as follows :

Kartṝn atho sākṣiṇaś ca sabhyān rājānam eva ca/
Vyāpnoti pādaśo yasmāc caturvyāpī tataḥ smṛtaḥ// 1.13.

From the standpoint of the results that may be procured through (good and impartial judgement) this has also been spoken of as *Catuskārī* by Nārada. It has been stated that it brings four results in the form of *Dharma*, *Artha*, fame and love or regard for the people :

Dharmasyārthasya yaśaso *lokaśaktes* tathaiva ca/
Caturṇāṃ karaṇād eṣāṁ catuṣkārī prakīrtyate//
Nārada, 1.14.

Lokaśakti has been explained as *lokānurāgaḥ* (Lokaśaktiḥ lokānurāgaḥ. p. 26).

In the pattern of the appellation as *Caturvyāpī*, it has again been stated that *Vyavahāra* is *Aṣṭāṅga*, i.e. having eight constituents, namely, king, his good officer, sabhyas, śāstra, accountant, scribe, gold, fire and water :

Rājā satpuruṣah sabhyāh śastraṃ gaṇakalekhakau/
Hiraṇyam agnir udakam aṣṭāṅgaḥ samudāhṛtaḥ//
Nārada, 1.15.

As is quite evident, the verse makes reference to the equipments which the king should have before he delivers the

judgement. We have from Bṛhaspati a picture of the assembly of the king in the following verse :

Pūrvāmukhas tūpaviśed rājā sabhyā udaṅmukhāḥ/
Gaṇakaḥ paścimāsyas tu lekhako dakṣiṇāmukhaḥ//
Hiraṇyam agnim udakaṃ dharmaśāstrāṇi caiva hi/

In continuation Bṛhaspati has elaborated the utility and job of the respective persons thus :

Nṛpo'dhikṛtasabhyāś ca smṛtir gaṇakalekhakau/
Hemāgnyambusvapuruṣās sādhanāṅgāni vai *daśa*// 1.87.
Etad daśāṅgaṃ karaṇaṃ yasyām adhāsya pārthivaḥ/
Nyāyāt paśyet kṛtamatiḥ sā sabhā'dhvarasmmitā// 1.83
Daśānām api caitaiṣāṃ karma proktaṃ pṛthak pṛthak/
Vaktādhyakṣo nṛpaś śāstā sabhyaḥ kāryaparīkṣakaḥ//1.88
Smṛtir vinirṇayaṃ brūte jayaṃ dānaṁ damaṁ tathā/
Śapathārthe hiraṇyāgnīambu tṛṣitajantuṣu// 1.89.

One may easily guess that the mention of the men and the materials for *Vyavahāra* by Nārada and even by Bṛhaspati is neither exhaustive nor final.

By taking into consideration the purpose or motive for the disputes in question it has been described as *Triyoni*, i.e. springing out of either of the three, namely, passion, anger and greed. Accordingly Nārada states :

Kāmāt krodhāc ca lobhāc ca tribhyo yasmāt pravartate/
Triyoniḥ kīrtyate tena trayam etad vivādakṛt// 1.26.

It has again been described as *dvyabhiyoga* on the ground that complaints may be grounded on suspicion or on fact. Thus one may be charged with the offence of theft and the like simply on the ground that the person concerned associates himself with persons of evil repute. Again he may be charged on the basis of the lost materials traced in his residence and thereby arousing suspicion. Thus Nārada states :

Dvyabhiyogas tu vijñeyaḥ śaṅkātattvābhiyogataḥ/
Śankā'satāṁ tu saṁsargāt tattvaṃ hoḍhābhidarśanāt// 1.27.

In the *Smṛticandrikā* Devaṇabhaṭṭa has illustrated the statement of Nārada :

Kitavastenādyasadbhis saṃsargāt sādhāv api steyādiśaṁkā bhavati. Hoḍhādidarśanam apahṛtaikadeśādiliṅgopalambhaḥ, pratyakṣadarśanaṁ vā. p. 26.

By taking into consideration the openings *Vyavahāra* has also been described as *dvidvāra*. Nārada describes it thus :

Pakṣadvayābhisambandhāt dvidvāras samudāhṛtaḥ/
Pūrvavādas tayoḥ pakṣaḥ pratipakṣas taduttaraḥ// 1.28.

Here it refers to the statement in record and the reply thereto. It is *dvigati* according as it is based either on truth or error :

Bhūtacchalanusāritvād dvigatiḥ sa udāhṛtaḥ/
Bhūtaṁ tattvārthasaṁyuktaṁ pramādābhihitaṃ chalam// 1.29.

It is *Dvipada* (of two aspects), which come to be eighteen owing to the manifoldness in the objects to be secured by litigation. The eighteen again become 1000 owing to the multifariousness of the matter to be proved :

Dvipade sādhyabhedāt tu pādāṣṭādaśatāṁ gate/
Aśṭādaśa kriyābhedād bhinnāny aṣṭasasasraśaḥ//Kāt.29.

The two aspects are civil (*dhanamūla*) and criminal (*hiṁsāmūla*). The former contains fourteen titles of law and the latter four.

Bṛhaspati has the same concept as expressed in the line :

Dvipado vyavahāraḥ syād dhanahiṁsāsamudbhavaḥ. 1.9.

This is also called *Dvirutthāna* as we gather from the statement of Kātyāyana :

Sādhyavādasya mūlam syād vādinā yan nivedātam/
Deyāpradānaṃ hiṃsā cety utthānadvayam ucyate//
Kat. 30.

Identically we find in the text of Bṛhaspati :

Hiṃsāṃ vā kurute kaś cid deyaṃ vā na prayacchati/
Dve hi sthāne vivādasya tayor bahutarā gatiḥ// Bṛ, 1.3.

Vyavahāra has again been described to be *Dviskandha* having two branches in the form of *Dharmaśāstra* and *Arthaśāstra* :

Dharmaśāstrārthāśāstre tu skandhadvayan udāhṛtam.
Kāt. 32.

It is *Dviphala* in view of the fact the it has two results in the form of victory and defeat :

Jayaś caivāvasāyaś ca dve phale samudāhṛte. Kat. 32.

This is in consonance with the statement of Hārīta :

Ekamūlo dvirutthāno dviskandho dviphalas tathā.
Quoted in the *Smṛticandrikā*.

THE

General Principles of Hindu Jurisprudence

LECTURE I

INTRODUCTION

Province of Law—General Jurisprudence and Particular Jurisprudence—Hindu Jurisprudence: what it means—Importance of the study of Hindu Jurisprudence—Difficulties in the study of Hindu Jurisprudence—(i) due to the peculiar character of the Hindu *Dharmaśāstras*—(ii) due to the peculiar character of the Science of Jurisprudence—(iii) a third difficulty due to uncertainty of chronology—Sources of Hindu Law—Fourfold indices of *Dharma* according to the Hindu Sages—(i) the *Vedas*—Doctrine of revelation—Practical value of the *Vedas* on questions of positive law—(ii) The *Smṛtis*—conflict among *Smṛtis*: how reconciled—the place of reason in the domain of sacred law—(iii) Established usages—How far authoritative when in conflict with *Smṛti*—(iv) Self-satisfaction—(v) the *Purāṇas*—(vi) Commentaries and *Nibandhas*—The growth of different Schools of Hindu Law—Importance of commentaries and *Nibandhas*—The sources of authority of the Hindu Law—*Dharma*: what it means, and whence it derives its authority—connection between Dharma and revelation—The idea of the good—How *Dharma* contains its sanction within itself in the certainty that its obedience will lead to welfare—whence does this certainty arise?—The theory of *Apūrva*—was the *Mīmāṁsā* system atheistic?—How positive law differentiates itself from ceremonial rules and moral and religious injunctions—Three characteristic elements involved in the conception of Positive law—The Hindu conception compared with the Austinian—the place of administration of justice in the functions of Hindu King—Arrangement and division of the subject—concluding remarks.

THE PROVINCE of law is the establishment of rules for the regulation of human conduct amidst the diversity of inclinations and desires, so as to reconcile and harmonise the wishes of the individual with the interest of the community in which

ultimately the interest of the individual is also involved; it curtails the fictitious freedom of unregulated desires by subordinating the particular nature of individual men to the discipline of the community acting upon universal rational principles, and thereby gradually tends to bring about the higher freedom which consists in the dependence of the individual on the dictates of reason, which, while governing its community, is also his. It may be that this conception of the aim of law is not consciously recognised at the outset, but there can hardly be any doubt that the various systems of law exhibit, on a careful analysis, so many efforts towards the realisation of the end indicated above at different stages of development. In so far as the conditions of different societies and the stages through which they have passed are not exactly similar, these systems of law which they have severally evolved are more or less dissimilar to one another; yet the unity of human constitution and the universality of human reason concur in producing an essential similarity in all those systems which exhibits itself to a scientific observer amidst the diversity of details. It is the province of general or abstract jurisprudence to analyse and systematise these essential elements underlying the infinite variety of legal rules without special reference to the institutions of any particular country. 'The proper subject of general or universal jurisprudence', says Austin, 'is a description of such subjects and ends of laws as are common to all systems, and of those resemblances between different systems which are bottomed in the common nature of man'. Jurisprudence, however, becomes particular or concrete when it takes its data from a particular system of law, and exhibits the essential ideas and principles, which go to constitute jurisprudence proper,—not in an abstract form, but coloured and shaped, as it were, by the concrete details of that particular system. It does not, it is true, enter into a discussion of all the complex rules which enter into the composition of the actual system of law on which it has its basis, but, while exhibiting the essential conceptions of law it does not altogether isolate them from the concrete shapes which they have assumed in that particular system, owing to the particular line of evolution through

which it has passed and the particular stage of development which it has attained. Identical social needs have been met by different communities in different ways; but, in as much as the needs are the same, and the forces which work for their removal are similar in their character, the differences in detail conceal within them a deeper unity. General Jurisprudence or Jurisprudence proper concerns itself to exhibit these elements of unity irrespective of their historical or geographical adjuncts, concrete Jurisprudence, having reference to a particular system of law, exhibits what shapes those elements have assumed by reason of the characteristic development of that system under the influence of historical and other particularising accidents.

It is not necessary for me, in this connection, to consider the view advocated by certain jurists, that the term 'Particular Jurisprudence' is a misnomer, and that the principles of Jurisprudence, in so far as they are scientific truths at all, are always general and of universal application; the subject of my proposed lectures being 'The General Principles of Hindu Jurisprudence,' all that is at present necessary for me to enquire is what the expression 'Hindu Jurisprudence' must be taken to imply as distinguished from general or abstract Jurisprudence having no special reference to any particular system of positive law. Now, it will follow from what I have already stated about the scope and methods of Particular Jurisprudence, that the aim and object of a dissertation on Hindu Jurisprudence must be the examination and ascertainment of the Hindu conceptions about the general topics of Jurisprudence as unfolded in the works of Hindu law-givers of recognised authority, with a view to exhibit the characteristic development of the Hindu Law in relation to the essential conceptions and principles common to all systems of law. Hindu Jurisprudence may therefore, be regarded as Hindu Law viewed from the standpoint of Jurisprudence, or as Jurisprudence reflected through the medium of Hindu Law. It will perhaps be better to explain my meaning by an illustration: Ownership, for instance, is one of the fundamental juristic conceptions common to all systems of law, and it is the function of Jurisprudence to explain its character and determine the conditions under which

it may be acquired, transferred, or extinguished; abstract jurisprudence discharges this function without special reference to any particular system of law; it analyses the constituent elements of ownership as a juristic conception, and considers and systematises the conditions of its acquisition, transfer and extinction. Now, Hindu Jurisprudence also would do the very same thing, but *not* without reference to the Hindu system of law; it would take notice of the line of evolution which the Hindu Law has pursued and the extent of development which it has attained; it would analyse and exhibit how Ownership has been understood by the Hindu jurists; it would examine and classify the conditions under which, according to the Hindu Law, it could be acquired, transferred, or extinguished; and, if necessary, it would seek to indicate, as far as possible, what position the Hindu Law is entitled, in this reference, to occupy in the evolution of juristic conceptions. As with ownership, so with other fundamental juristic conceptions; and, furthermore, our study would not confine itself to the substantive branch of Hindu Law alone, but must also pass under review the adjective branch thereof.

Having thus briefly indicated the character and scope of the subject of our discourse, it may not be out of place to say a word or two about the importance of the study which we have thus undertaken. ". indu Law" says Mr. Mayne,[1] "has the oldest pedigree of any known system of jurisprudence, and even now it shows no signs of decrepitude. At this day it governs races of men, extending from Cashmere to Cape Comorin, who agree in nothing else except their submission to it. No time or trouble can be wasted, which is spent in investigating the origin and development of such a system, and the causes of its influence." At the same time, it must be remembered, that though so ancient, it cannot, in all its departments, be pronounced to be very familiar to any of us; owing to altered conditions of the Hindu Community, a considerable portion of it does not at all attract the attention of a practising lawyer, and, whatever its intrinsic antiquarian and theoretic interest may be, it will not be an exaggeration to say

1. Mayne, *Treatise on Hindu Law and Usage*; preface (1st Edn.).

that it has practically remained a sealed book to most of us. 'The law' says Dr. Ghose, 'which moved the admiration of Sir William Jones has ceased, in one sense, to be living law, and must be sought at the present day, not in our books of report, but in the texts of our sages, and in the writings of the successive Jurisconsults by whom Hindu Law was gradually moulded into system,'[2] and, as he further observes, 'Legal antiquities ought to engage our special attention as India offers a rich and varied field for such enquiries. The harvest has long been ripening for the sickle, but as yet, to our reproach, the reapers are few in number, and that wealth of materials which should be our pride is now our disgrace.'[3] It, therefore, gives me unfeigned pleasure to find that the Calcutta University has been pleased to prescribe '*The General Principles of Hindu Jurisprudence*' as one of the subjects for the *Tagore Law Professorship* ; and who knows that, if properly pursued, it may not furnish at least some materials for the fulfilment of Dr. Ghose's prediction that, 'Hindu Law will, at no distant date, render the same service to Jurisprudence that Sanskrit has already done to the sister science of Philology.'

We cannot, at the same time, shut our eyes to the immense difficulties which lie in our way in pursuing this study. In the first place, the Hindu *Dharma-śāstras*, which are the principal sources of Hindu Law, do not confine themselves to the enunciation of juristic rules for the guidance of human conduct ; ceremonial rules, moral and religious injunctions, and strict legal precepts are found mingled up, and no clear line of demarcation is uniformly maintained, so as to keep them separate, and prevent a confusion of ideas in minds not sufficiently familiar with the rules of logic and canons of construction by which they have to be discriminated from one another. This difficulty in the study of Hindu Law and the proper understanding thereof has been very forcibly pointed out by their Lordships of the Judicial Committee of the Privy Council, in the case of *Sri Balusu Gurulingaswami* V. *Sri Balusu Ramalakshmamma*,[4] where their Lordships observe as follows :

2. Rash Behari Ghose, *The Law of Mortgage in India*, (4th Edn.) p. 35.
3. *Ibid.* p. 63.
4. I. L. R. 22 Mad. 398, at p. 415.

"Their Lordships had occassion in a late case to dwell upon the mixture of morality, religion and law in the Smṛtis : *Rao Bulwant Sing* v. *Kishori*. They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said :—All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu Law, Sir William Macnaghten says: 'It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the *vinculum juris* and *vinculum pudoris* is not always discernible'. They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting texts of mixed religion, morality, and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgment in private affairs, should introduce restrictions into Hindu Society, and impart to it an inflexible rigidity, never contemplated by the original lawgivers." It is impossible not to recognise that there is considerable force in the above observations, and that a student of Hindu Jurisprudence must critically examine and discriminate the precepts intended to have a strict legal bearing as distinguished from those having merely a moral or religious application. At the same time, it must not be forgotten that the complete abstraction of the legal rules from their moral and religious adjuncts may sometimes be calculated to throw into the shade their real character, and invest them with an altogether foreign grab, and that this must especially be the case with regard to some of the most important ceremonies of our domestic life, such as marriage and adoption, which with us have both a religious and secular aspect. On the whole, therefore, it seems to me that in order to be properly studied and understood, the legal rules must be separated but not completely detached and

isolated from their moral and religious adjuncts, especially in those cases where the ceremonies to which the legal rules relate partake of both a religious and a secular character. In the second place, besides the above difficulty arising from the peculiar character of the Hindu *Dharma-śāstras*, there is another due to the peculiar character of the science of jurisprudence itself. Jurisprudence, as we have it, is pre-eminently a Western science; it had its foundation in the Roman Law, which, for the first time among the Western nations, reduced legal rules to order and coherence, and throughout its development, its divisions and classifications have been modelled on the divisions and classifications of the Roman Law. The result is that in the study of Jurisprudence, whatever may be the system of law which furnishes us with materials for the same, we start with certain preconceived ideas about and a pre-arranged scheme of classification for juristic conceptions borrowed from the Roman Law. This works well enough so long as we confine our attention to the Western systems of law, for they have all, more or less, been based upon and influenced by the Roman Law; but to approach the study of Hindu Law with an expectation to find the exact counterparts of the ideas and classifications referred to above, may not always prove equally convenient or successful. In order to be properly appreciated and understood, Hindu Law must, therefore, be studied from within, with such light as it itself affords, and under such guidance as we may receive from a study of analytical and comparative Jurisprudence as regards the points on which we should bestow our special attention; and when in this way we succeed in grasping the fundamental conceptions and principles contained therein, we may proceed to arrange and systematise them with reference to similar topics in other systems of law and compile and note striking points of similarity or contrast whenever such comparison may be instructive or interesting. While on this point, there is yet another difficulty which occurs to us; Hindu Law has had a development of its own, and whatever the orthodox assumption may be, it can scarcely be conceived that the Hindu Jurisprudence furnishes an exception to the general law of evolution,

and that there the same conceptions and the same rules have prevailed from almost the dawn of human civilisation upto relatively modern times; the question, however, is, how far is it possible to trace the course of gradual development of Hindu juristic ideas ? Now, I have often thought that there is nothing so uncertain as Hindu chronology, and the researches of modern antiquarians in this direction have given rise to so many hopelessly divergent conclusions and haphazard generalisations, that one may be excused if one feels considerable hesitation in relying upon their conjectures in any case. The only way, therefore, out of the difficulty, is to apply, with adequate caution and circumspection, the critical method of enquiry upon the materials furnished by our law-givers with a view to discover in them, as far as possible, under the light furnished by comparative jurisprudence, the record of the onward march of juridical ideas along the line of progressive evolution; in pursuing this enquiry we should avoid the error of extremes; on the one hand, we should not rashly rush into conjectures which are not fully warranted by the evidence available to us, and on the other hand, we should not allow ourselves to be overeawed by the phantoms of superstition which may stand in our way, under various subtle disguises and endeavour to keep us fastened to the prejudices of the past.

Having observed upon the importance of the subject of our discourse and some of the difficulties which we must encounter in its study, I think it will not be now out of place to enquire what are the sources of Hindu Law. The character of our subject requires such a preliminary enquiry, and I must pursue it although the subject has so often been discussed that I may not have much new information to impart. As it has been often noticed that the expression 'sources of law' is not altogether free from ambiguity, I may at once make it clear that I take the expression sources of Hindu Law' to denote what Vijñāneśvara calls *jñāpakahetu, i.e.*, the sources from which our knowledge of that law must be derived. The question, therefore, is, what are the sources to which we must refer in order to obtain a knowledge of Hindu Law ?

Now, as we all know, there are, according to the Hindu

sages, four indices by reference to which '*Dharma*' or approved conduct may be ascertained. Thus Manu declares,—The *Veda*, the *Smṛti*, the usage of good men, and what is agreeable to one's soul, the wise have declared these to be the fourfold indices of '*Dharma*' or approved conduct.'[5] The word '*Dharma*' used in this passage no doubt covers a wider field than positive law, but the latter, according to Hindu conception, has no existence apart from the former, for positive law is but a portion of the sacred law which, by reason of its peculiar character and the exigencies of the community, is enforced by the king. That being so it is only proper that we should examine how far the four indices enumerated above may be regarded as the source of positive law as understood and obeyed by the Hindus.

(1) The *Vedas*—There can be no doubt that every Hindu lawyer must admit that theoretically the Vedas must be regarded as the primary authority on all questions relating to the proper conduct of a man including questions falling within the sphere of positive law wherever any guidance may be obtained from them with reference to such questions. The authority of Vedic texts containing precepts for the regulation of human conduct is founded on direct revelation : the wisdom of these precepts and their authoritative character are fundamental assumptions of Hindu Law which are not to be questioned or tested by the application of sceptical reasoning. I have elsewhere tried to explain the theoretical basis of this view in these words : The sphere of revelation has reference to two kinds of topics : (i) That which is *siddha* and that which ought to be done *i.e.*, *sādhya*. The *Vaidika* Philosophers of India maintain that with regard to the latter topic the usual secular sources of knowledge (*i.e.* observation and inference) must necessarily be imperfect, for the rightness and wrongness of an action is not one of its sensible characters that can be directly perceived ; and moreover, if in ascertaining the ethical character of an action one has to refer to its result, even

5. Vedaḥ smṛtiḥ sadācāraḥ svasya ca priyam ātmanaḥ/
Etac caturvidhaṁ prāhuḥ sākṣād dharmasya lakṣaṇam//M.S, II.12.
For a detailed discussion on the Sources of Dharma vide, R. C. Hazra, in the *Our Heritage*, Vol. II, Pt. II. Vide also subsequent Volumes.

the shortcoming of observation and inference is apparent, for although they may enable a person to measure approximately the effect of an action so far as it exhibits itself during the short span of a man's life, there remains an illimitable region beyond which they cannot encompass within their range. This shortcoming, then, has to be mended by reference to the Vedas which contain injunctions and prohibitions indicating what actions should be performed and how they should be performed."[6] But whatever the theory may be, practically we derive very little light from the *Vedas* in regard to any question of positive law. As Babu Gopal Chandra Sarkar points out : 'The *Śruti* contains very little of lawyer's law ; they consist of hymns, and deal with religious rites, true knowledge, and liberation. There are, no doubt, a few passages containing an incidental allusion to a rule of law or giving an instance from which a rule of law may be inferred."[7] For all practical purposes, therefore, we must refer to the *Smṛtis* or *Dharma-śāstras* for the ascertainment of positive law.

(2) The *Smṛtis* or *Dharma-śāstras*—Theoretically the authority of the *Dharma-śāstras* is derivative in its character. Not containing a direct record of the revelation, it is advanced that they embody the purport of Vedic texts as recollected by the sages who were their authors, and it is contended that even where the *Vedic* texts corresponding to the precepts contained in the *Smṛtis* are not expressly found, it must be inferred that they did exist but have now been lost owing to the frailty of human memory or some other cause of a similar nature. Hence Jaiminī declares, 'the *Smṛtis* having been compiled by sages who were also the repositories of the revelation, there arises an inference that they are founded on the *Śruti* or revelation, and should therefore be regarded as authoritative. But if there be conflict, the precept of the *Smṛti* must be disregarded since the inference arises only when there is no such conflict.[8] But however that may be, practically, as I

6. 4 C.L.J. 22n.
7. Hindu Law, (3rd Edition), p. 11.
8. Api vā kartṛsāmānyāt pramāṇam anumānam syāt.
Mīmāṁsā-darśana, 1.3.2. Virodhe tv anapekṣyaṁ syād asati hy anumānam.

have, already pointed out, recourse can very seldom be had to Vedic texts on any question of positive law, and the *Smṛtis* must be regarded as constituting the principal source of a lawyer's law.

There are numerous *Smṛtis* ascribed to the authorship of different sages, and twenty of these have been enumerated in the well-known text of Yājñavalkya which runs as follows: Manu, Atri, Vishṇu, Hārīta, Yājñavalkya, Aṅgiras, Uśanas, Yama, Āpastamba, Saṁvartta, Kātyāyana, Bṛhaspatī, Parāśara, Vyāsa, Śaṃkha, Likhita, Dakṣha, Gautama, Śātātapa, and Vaśiṣṭha are the compilers of *Dharma-śāstras.*[9] But these are not all, for, as the Mitakṣarā points out, the enumeration is not exhaustive, so that compilations of Budhāyayana, Nārada and others are also regarded as authoritative *Dharma-śāstras.* Theoretically all these *Dharma-śāstras* are of equal authority, for all of them are supposed to have been based on the pronouncements of the *Vedas*; a superior position, however, is, by universal consensus, accorded to the Institutes of Manu. So Bṛhaspatī declares, 'The first rank (among the law-givers) belongs to Manu, as he embodied the true sense of the *Vedas* in his work; that *Smṛti* (or text or law) which is opposed to the tenour of the law of Manu is not approved'.[10] It may naturally be expected that there being so many *Smṛtis* their pronouncements would not always be found to agree, but apparent conflict would be found to exist among them. The posibility of such conflicts is recognised even by the *Smṛtis* themselves, although commentators make every possible effort to reconcile conflicting texts and harmonise them into one consistent whole, it being an established rule of

Ibid, 1.3.2. For interpretation of the rules vide the *Śabarabhāṣya* and the *Tantra-vārtika* of Kumārilabhaṭṭa.

9. Manvatriviṣṇuhārītayājñavalkyośano'ṅgirāḥ
Yamāpastambasambartāḥ kātyāyanabṛhaspatī/
Parāśaravyāsaśaṅkhalikhitā dakṣagautamau
Śātātapo vasiṣṭhaś ca dharmaśāstraprayojakāḥ// Y.S, 1.4-5.

For discussion on the number of Smṛti-writers vide P. V. Kane, *History of Dharmaśāstra*, Vol. I, pp. 302 ff.

10. Vedārthopanibandhṛtvāt prādhānyaṁ hi manoḥ smṛtam/
Manvarthaviparītā yā sā smṛtir na praśasyate// Bṛhas. Saṁ. 13.

construction that no conflict should be admitted to exist where it is possible to find an interpretation which would explain away the apparent conflict and make the whole thing consistent. It is not necessary, in this place, to advert in any detail to the various ways in which commentators try to reconcile conflicting texts; sometimes, out of two conflicting texts, the one which is more rigid is pronounced to be more commendable, and the laxer one is treated as meant for those who are unfit to abide by the strict rule; sometimes they are reconciled as having different spheres of application, the texts being turned and twisted in interpretation with a view to enable them to stand together without contradiction, and so on; and we shall meet with examples of these ingenious devices in the subsequent parts of our discourse. The modern method of explaining the existence of these conflicting texts by referring them to different periods in the evolution of legal ideas is, for obvious reasons not generally recognised, although instances of variation in legal rules with the progress of time, or rather, as the Hindu lawyer would prefer to put it, with the progressive degeneration of human capacities, are not altogether unknown, the most glaring assertion of such a variation being contained in the text of Parāśara declaring that 'the *Dharmas* of men vary in the several *Yugas* in keeping with the character of each *Yuga*'.[11] When, however, the conflict cannot thus be easily explained away, it seems that the sages contemplated that preference should be given to the view which is more consonant with reason. So Nārada says, 'In a case of conflict between *Dharma-śāstras*, that which is consonant with reason should be adopted as the proper course'.[12] But later commentators explain this by saying that it is not meant by texts like the above that in a case of conflict between two texts of *Dharma-śāstras* one should judge by the exercise of his independent reason which one should be preferred, but that he should exercise his reason with a view

11. Anye kṛtayuge dharmās tretāyāṁ dvāpare pare/
Anye kaliyuge nṛṇām yugarūpānusārataḥ// Parā. 1.2.2.
vide also Manu, I.85.

12. Dharmaśāstravirodhe tu yuktiyukto vidhiḥ smṛtaḥ. Nār. 1.40.

to reconcile the two texts by interpreting them in such a way that they may stand together without contradiction. Thus Vīramitrodaya, referring to the text of Yājñavalkya, 'In a case of conflict between Smṛtis, reason prevails according to usage'[13], observes, 'The import of the above text is that the *Smṛti* which accords with reason prevails over another which does not accord with it, and therefore the one which does not accord with reason should be explained as having a different import'.[14] It may be observed that this view of the commentators maintaining that the proper function of reason in the domain of sacred law is to explain away apparent conflicts and reconcile and harmonise the various texts of *Dharma-śāstras*, and not to assume a superior and independent position and adjudge the relative merits of conflicting texts, is but a logical corollary from the assumption that the sages who were the law-givers were infallible and they truly reproduced the purport of the Vedic texts of which they were the repositories, and it seems to be in keeping with the spirit of Manu's declaration, 'By *Śruti* (revelation) is meant the Veda, by *Smṛti* (tradition) the Institutes of the sacred law : these two must not be called into question in any matter, since from these two the sacred law shone forth. Every twice-born man, who, relying on the science of dialectics despises these two sources is fit to be cast out by the virtuous as the scorner of the *Veda*.'[15] The place of reason in the domain of sacred law is, therefore, according to the commentators, a circumscribed and subordinate one, its function being to ascertain the real meaning of the various pronouncements of *Dharma-śāstras* and harmonise them with one another, and never to supersede their place, subvert their authority, or sit as an arbiter between them. It may not be quite safe to speculate upon a subject

13. Smṛtyor virodhe nyāyas tu balavān vyavahārataḥ. Y.S, II.21.

14. Tasyāyam āśayaḥ, nyāyānupaṣṭabdhasmṛtyapekṣayā nyāyopaṣṭabdhā smṛtir balavatīti nyāyānupaṣṭabdhasmṛtes tātparyāntarakalpanā kāryā. Vīr. Vya., 13.

15. Śrutis tu vedo vijñeyo dharmaśāstraṁ tu vai smṛtiḥ/
Te sarvārtheṣv amīmāṁsye tābhyāṁ dharmo hi nirvabhau//
Yo'vamanyeta te mūle hetuśāstrāśrayād dvijaḥ/
Sa sādhubhir vahiṣkāryo nāstiko vedanindakaḥ// M.S, II.10-11.

like this, but it seems to me that in this extreme reverence towards each and every pronouncement of the *Dharma-śāstras* and the curtailment of the scope of reason in relation thereto, the commentators display a return to the earlier rigidity and stricter orthodoxy of Manu's time from which later law-givers, such as Yājñavalkya, Nārada and Bṛhaspati, were prepared to allow a qualified departure.

(3) *Sadācāras*,[16] or the established usages of good men furnish a supplementary criterion for ascertaining the nature of approved conduct. There is however, a dispute as to whether such usage can at all prevail as evidence of commendable conduct, when it conflicts with an express text of *Smṛti*. The leading commentators seem to be of opinion that in a case like this the express text must prevail, and the reason they assign is this : An established usage not supported by any available text of *Smṛti* still raises the presumption that there must have been some text of *Smṛti* at the basis of the usage which has now been lost or forgotten ; this presumption is, however, rebutted when we find an express text of *Smṛti* condemning the conduct. The basis of the presumed propriety being thus gone, it follows that the prevalent usage can no longer be supported as proper. In support of this proposition, I may refer to the discussion contained in one of the Adhikaraṇas of Mādhavācārya's *Jaiminīya-nyāya-mālā-vistara*, which runs as follows : In Southern India, there is a custom among the learned of marrying one's maternal uncle's daughter. This custom being in conflict with an express text of *Smṛti* prohibiting such marriage, the question arises whether it can be accepted as good evidence (of conduct approved by sacred law) or not. It may be contended that it is good evidence like other established usages, but that is not correct because it is opposed to *Smṛti*. The weight attached to the usage of

16. For interesting and informative discussion on the importance of customs as authority on *Dharma*, vide Kane, *History of Dharmaśāstra*, III, 845-884; *Hindu Custom and Modern Law* (Bombay, 1950) ; A.S. Altekar, *Source of Hindu Dharma* (Sholapur, 1953) ; R. Lingat. *Les Sources du Droit dans le Systéme traditionnel de l'Inde* (Paris, Mouton, 1967) ; J. D. M. Derrett, '*Custom and Law in Ancient India*' in *Religion, Law and the State in India* (London, 1968).

the learned arises from the inference that it is based on *Smṛti* (although an express text may not be traceable), but when there is an express text opposed to the usage, the inference must give way."[17]

It should, however, be observed that this view does not imply that an established usage, when it conflicts with an express text of Smṛti, should be condemned by the king. The condemnation proceeds from the broader standpoint of *Dharma* which has a religious reference, but by reason of the existence of the established usage, conduct in consonance with it must be tolerated though not approved by the king. Thus Bṛhaspati expressly declares: "Local, tribal and family customs wherever they prevail from before must be respected; otherwise, the subjects become agitated, popular disaffection springs up, and the strength and the treasury (of the Government) suffer in consequence; (then giving certain instances of customs condemned by the Smṛtis, Bṛhaspati proceeds to observe), by such a conduct those (who pursue it) do not render themselves liable to expiation or punishment,"[18] and commenting upon these passages, the *Vīramitrodaya* observes as follows: The author of *Madanaratna* says that the prescription of punishment and expiation for the performance of such acts in other Smṛtis applies to localities other than those specified in these texts. We are, however, of opinion that the visible harm such as popular discontent spoken of in the text indicates that the king should in no way inflict any punishment in such a case; but the absence of expiation has been spoken of with reference to social intercourse, and not with reference to purity in the life to come, for which latter purpose expiation is of course requisite, so that there arises no con-

17. Yo mātulavivāhādau śiṣṭācāraḥ samā na vā/
Itarācāravan mātvam amātvam smārtabādhanāt//
Smṛtimūlo hi sarvatra śiṣṭācāras tato'tra ca/
Anumeyā smṛtiḥ smṛtyā bādhyā pratyakṣayā tu sā// N.M.V, 1.3.5.

18. Deśajātikulānāṁ ca ye dharmāḥ prāk pravartitāḥ/
Tathaiva te pālanīyāḥ prajāḥ prakṣubhyate'nyathā/
Janāparaktir bhavati balaṁ kośaś ca naśyati/

Anena karmaṇā naite prāyaścittadamārhakāḥ./ Bṛhas, I.126-7, 130.

flict with other *Smṛtis*. When conduct opposed to *Śruti* and *Smṛti* extends over an entire locality, the sinfulness of the conduct loses its force of obstructing social intercourse (through excommunication), but its force causing hell (*i.e.*, misery after death) remains intact, because on a consideration of the preamble, the purpose of the texts quoted above being fitly fulfilled on ascribing this much of meaning to them, it is improper to imagine an absolute want of guilt ; hence it has been said by Āpastamba : 'Local, tribal and family customs are authoritative when they are not opposed to sacred law'. In the text, *viz.*, 'those who follow customs handed down through successive generations and acted upon by predecessors incur no guilt thereby ; not so with other people', the expression 'incur no guilt' means 'do not become liable to excommunication and punishment from King' ; otherwise, it becomes difficult to avoid conflict between these two texts."[19]

The introduction of political considerations is a very noticeable feature of these texts, and the commentator therefore contends that although these considerations may be sufficient to induce the King not to punish those who follow these established usages condemned by the *Dharma-śāstras*, and although by reason of their wide prevalence no question of social ostracism can possibly arise as a punishment for infraction of śāstric injunctions, yet, in so far as they are opposed to express directions of *Dharma-śāstras*, they can

19. Yat tu smṛtyantareṣv etatkarmakaraṇe prāyaścittadaṇḍasmaraṇaṁ tad etadvacanānupāttadeśaviṣayam iti madanaratnakāraḥ. Vayaṁ tu prajāprakṣobhādidṛṣṭadoṣakathanād rājñā tatra daṇḍo na kārya eva. Prāyaścittābhāvas tu vyavahāraviṣayaḥ. Paralokaśuddhyarthaṁ prāyaścittam bhaved ity eveti na smṛtyantaravirodhaḥ. Tattaddeśavyāpakaśrutismṛtiviruddhācaraṇe vyavahārapratibandhikāśaktis tajjanyapāpasya nāsti, narakajanikāsty eva. Upakramaparyālocanād etāvadarthakatayaiva caitadvacanopapattau sarvathā doṣābhāvakalpanasyānucitatvāt. Ata evāpastambenoktaṁ, deśajātikuladharmāś cāmnāyair aviruddhāḥ pramāṇam iti. Yeṣām paraṁparāprāptāḥ pūrvajair apy anuṣṭitāḥ/Ta eva tair na duṣyeyur ācārā netare punar ti. 'Na duṣyeur' avyavahāryā rājadaṇḍyāś ca Na bhaveyur ity arthaḥ. Anyathaitayor eva vacanayoḥ ı arasparavirodhaḥ duṣparihāraḥ syād iti brūmaḥ.

Vīramitrodaya, *Vyavahāraprakāśa*, p. 22. (Chowkhamba Sanskrit Series, 1932)

at best be tolerated but not approved. The conclusion, therefore, is that such customs or usages wherever they exist must be tolerated and recognised in the administration of justice, but must not be recognised as affording any index of *Dharma* or commendable conduct and encouraged as such. Their Lordship of Privy Council have laid down in the case of *Collector of Madura* v. *Moottoo Ramaliṅga*[20] that 'under the Hindu system of law, clear proof of usage will out-weigh the written text of the law.' There can be little doubt that for all practical purposes this statement is correct enough, although it may require some qualification, as indicated above, from a standpoint outside the scope of positive law. All that their Lordships should, therefore, be taken to lay down is that an act or transaction in consonance with an established usage cannot be treated as illegal or void of legal effect merely because it transgresses a written text of *Dharma-śāstra*, and the position thus understood cannot possibly be doubted or assailed.

It should be mentioned that besides local, tribal and family customs, the existence of special customs among commercial classes was also recognised, and the king was enjoined to give due weight to them in actions involving their consideration.[20a]

On the whole, therefore, it follows that besides the *Dharma-śāstras*, established usage may be regarded as affording a supplementary source of Hindu Law, but it need hardly be observed that being essentially circumscribed and variable in their character, they cannot be of much assistance in a discussion on the general principles of Hindu Jurisprudence which must principally be gathered from the *Dharma-śāstras* themselves.

(4) *Ātma-tuṣṭi*, or self-satisfaction—is also mentioned as an index of *Dharma* or commendable conduct. It is, however, explained that this criterion should only be resorted to when no guidance can be obtained from the *Dharma-śāstras* themselves, and a man has to choose between alternative courses of action according to his own lights. So a passage ascribed to Garga declares that self-satisfaction is the guiding

20. 12 Moo, I.A, 397, at p. 436.

20a. Vide *Arthaśāstra*, III.7 ; *Manu*, VIII.41 ; 46 ; *Yāj.* 1.343 ; II.192.

principle among optional alternatives.[21] It need hardly be stated that this criterion has nothing to do with any question of positive law ; it is not an external objective standard at all, but is an internal ethical standard by reference to which one should settle one's line of action among several courses left by the *Śāstras*.

Having thus passed under review the four sources from which, according to Manu, the knowledge of *Dharma* may be obtained, we find that the *Smṛtis* and the established usages may, for all practical purposes, be regarded as the two principal sources of positive law. Besides these we should also mention the *Purāṇas* which are often cited by commentators and writers of *Nibandhas* as authorities on questions of Hindu Law.

(5) The *Purāṇas*[21a]—There are numerous works known as *Purāṇas* among which eighteen are called *Mahāpurāṇas* or principal *Purāṇas*. Curiously enough, all of them are ascribed to the authorship of Vyāsa, though there can be no doubt that they belong to different periods and bear unmistakable marks of not being the works of the same author. They generally start with a mythical account of the origin of the creation, and then proceed to record the history of various ancient families interspersed with mythological stories and sectarian disputes ; jurisprudence is not a subject with which they are directly concerned, but incidentally they sometimes deal with questions of law, and are cited by later commentators and writers on Hindu Law as authorities on such questions, although it is recognised that they can never be allowed to overide the *Smṛtis* but must yield to the superior authority of the latter, if any conflict be found to exist between them.

The above review, however, is not exhaustive, for it only deals with what may be called the original sources of Hindu

21. Vaikalpike ātmatuṣṭiḥ pramāṇam.
Quoted by Kullūka on *M.S*, II.6.

21a. For the importance of the *Purāṇas* and their relation with the *Smṛtis* the following books deserve special mention : P. V. Kane, *History of Dharmaśāstra*, Vol. I, (Revised ed. 1968), pp. 408 ff. ; Vol. V. Pt. II (Poona, 1962) pp. 814 ff. ; R. C. Hazra, *Studies in the Upapurāṇas*, Vols. I & II. (Calcutta 1958, 1963).

Law, and it is necessary to enquire how they were supplemented in later times, when people would no longer accord the dignity of a direct law-giver to any of their contemporaries. This brings us to the commentaries and *Nibandhas* (compendia) written by learned writers of more recent times.

(6) Commentaries and *Nibandhas*—As it has been already indicated, in the course of the development of Hindu Law there came a time when the productive period, if I may say so, was succeeded by a critical period. The criticism of commentators and *Nibandhakāras*, however, could not, for obvious reasons, be of an avowedly aggressive character ; the authority of the *Dharma-śāstras* they did not and could not possibly disown, and their task consisted in interpreting them and reconciling their pronouncements whenever any apparent conflict stared them in the face. The task was no doubt a difficult one ; the original sources of the law remained constant of which no portion could be discarded as unauthoritative, or improved upon as erroneous or defective ; conflicts between their pronouncements had to be explained away and reconciled ; and beyond these there were perhaps the demands of a progressive time which had to be met not by the introduction of avowed innovations but by ingenious interpretation working upon old materials. It need hardly be said that these writers could not lay claim to any independent authority ; their pronouncements were authoritative only in so far as they were deemed to correctly interpret the original sources, and anybody was free to show that they were wrong. But it so happened that when the views of a particular writer, who, by reason of his superior scholarship and sanctity of life, commanded the reverence of the people of a particular locality, got a firm hold upon those people and began to mould their lives and institutions, the chances of those views being easily shaken off diminished from day to day, and at last there came a time when his interpretations might be said to have almost superseded the original authorities on which they were based, although theoretically this could never be and no commentator could, as of right, claim to have said the last word on any disputed question of law. It was in this way that different schools

sprang up recognising the superior authority of different commentaries and compendia within the regions governed by them, and at the present moment one need not feel much reluctance to endorse the view of the Privy Council, as stated in the case of *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*,[22] that the duty of a Judge who is under the obligation to administer Hindu Law "is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authority, as to ascertain whether it has been received by the particular school which governs the District with which he has to deal", with this qualification, which has been laid down in other cases, that a family, which has migrated from one Province to another, continues to be governed by the law as it obtains in the Province from which it has migrated unless and until it either expressly or impliedly adopts the law of its new domicil.[23] The importance of Commentaries and *Nibandhas* of recognised authority therefore stands on a double basis; in the first place, they collect and harmonise the diverse texts of *Dharma-śāstras* bearing on various topics of law, and in the second place, the interpretations which they put upon them acquire a sort of independent authority in the particular Provinces specially governed by them. In the part which commentators have thus played in the development of Hindu Law, it is difficult to discriminate how far established usages have tinged the interpretations which they have put upon the text of *Dharma-śāstras*, and how far their interpretations themselves have moulded and modified those usages; all that can be safely surmised is that there must have been interaction between the two, so that interpretations influenced by usages did, in their turn, influence the usages themselves. However that may be, the conclusion at which we arrive from the above discussion is that the main sources to which reference must be made by a student of Hindu Jurisprudence are the *Dharma-śāstras* and their expositions in the recognised commentaries and treatises of the later writers.

22. 12 Moo, I.A. 397 at p. 436.

23. See Soorendranath v Mt. Heeramonee 12 Moo, I.A. 91; Parbati Kumari v Jagadis Chunder, I.L.R 29 Cal, 433.

Having thus discussed the question as to what are the sources from which we must seek to obtain materials for the treatment of our subject, I now proceed to trace the sources from which the Hindu Law derives its authority or imperative character. I have already indicated that the Hindu Law-givers included legal rules, as well as moral and religious precepts, within the broader conception of '*Dharma*'. Etymologically, the word '*Dharma*' signifies that which supports and sustains; from the standpoint of the individual, it supports and sustains him through the temptations and vicissitudes of life, and from the standpoint of the community at large, it is the source of its solidarity and strength; nay, the *Taittirīya Śruti* declares, 'it is the support of the entire world.'[24] There can be no doubt that this broad conception of *Dharma* was the result of a reflective generalisation which must have been preceded by the enunciation and recognition of concrete rules of action, and in the Vedic age of Hindu Society these rules of action demanded obedience on the score that they were grounded on direct revelation. In this way such a connection was established between the idea of *Dharma* and revelation, that even in the age of *Dharma-śāstras*, which succeeded the Vedic age, the sages, who did not claim to be the recipients of direct revelation justified the precepts laid down by them on the ground that they also were ultimately based on or deducible from the precepts of the *Vedas*, and Jaimini, the author of the *Mīmāṁsā* aphorisms, declared that 'revelation being the root of *Dharma*, whatever is not (directly or indirectly) based on revelation need not be attended to.'[25] But as I have indicated, implicit obedience to an external mandate, however hallowed it may be by the reverence due to revelation, cannot proceed very long without being followed by a rational reflection. My natural inclinations impel me to proceed one way; the *śāstras* command me to follow another; why should

24. Dharmo viśvasya jagataḥ pratiṣṭhā. *Tai. Ār*, X.63.
Reference may be made here to Th. Stcherbatsky, *The Central Conception of Buddhism* (3rd Edn. Calcutta, 1961); E. Conze, *Buddhist Thought in India* (1962).

25. Dharmasya śabdamūlatvād aśabdam anapekṣam syāt.
Mīmāṁsādarśana, I.3.1,

I follow the latter course in preference to the former? The question must have suggested itself very early in the evolution of Aryan thought and the answer was afforded by the differentiation between the pleasurable and the good. So in the *Kaṭhopaniṣad* we find, 'The good is different, the pleasurable is different; they both induce a man to diverse kinds of activities; among the two, he who takes up the good attains welfare, but he who selects the pleasurable misses it.'[26] It will thus appear that two different but interconnected ideas clustered around the term *Dharma*, (i) foundation on revelation, and (ii) conduciveness to true welfare, and both these ideas are conveyed in the definition of Jaimini, '*Dharma* is that object of welfare which is indicated by an injunction.'[27] The final end of *Dharma* indicated above is distinctly set forth by Vasiṣṭha where he says that 'after studying the *Vedas*, enquiry should be made about *Dharma* with a view to the ultimate attainment of permanent welfare (salvation); knowing it and regulating one's conduct accordingly, the virtuous becomes most commendable in this life or after death'[28]; and Kaṇāda in his *Vaiśeṣika* Aphorisms expressly defines *Dharma* as the source from which welfare and eventually salvation are realised.[29]

The above discussion will make it clear that according to the Hindu ideas *Dharma* or sacred law contains its authority within itself; the king is not superior to it, but, like other human beings, is subject to it. It is authoritative because its observance is conducive to welfare and ultimately to salvation, and its violation is reprehensible because that is sure to lead

26. Anyac chreyo'nyad utaiva preyaḥ te ubhe nānārthe puruṣaṁ sinītaḥ/
Tayoḥ śreya ādadānasya sādhu bhavati hīyate'rthād ya u preyo vṛṇīte//
Kaṭhopaniṣad, II.1.

27 Codanālakṣaṇo'rthaḥ dharmaḥ. *Mīmāṁsādarśana*, 1.2.2.
For explanation of this *Sūtra* vide the *Bhāṣya* by Śabara and the *Tantravārtika*.

28. Athātaḥ puruṣaniḥśreyasārthaṁ dharmajijñāsā. Jñātā cānutiṣṭhan dhārmikaḥ praśasyatamo bhavati loke pretya svargalokaṁ samaśnute.
Vasiṣṭhadharmaśāstra, I.1-3.

29. Yato'bhyudayaniḥśreyasasiddhiḥ saḥ dharmaḥ.
Vaiśeṣikadarśana, 1.1.2.

to misery. Within the sphere of sacred law, the king has his own function which is partly general and partly special in its character ; it is general in so far as it is his duty to obey the law himself like other individuals, and it is special in so far as, unlike other individuals, it is his duty to enforce its obedience in others to a certain extent. The Law is supreme ; the will of the king is not its originator, and its sanction is not derived from any extrinsic or accidental agency, for it contains its sanction within itself in the certainty that obedience to law will lead to welfare and its violation to misery. It may, however, be asked whence does this certainty arise ? Is it to be supposed that the law represents commands issuing from God whose will upholds them by attaching due reward or punishment to actions in conformity with or in violation of those commands ? No doubt this may seem to be the most natural standpoint, but, in fact, the *Mīmāṁsakas* who may be said to have dealt with the philosophy of the Law did not introduce divine intervention in order to explain the fruition of human actions ; they maintained that every action had an invisible force which subsisted even after the cessation of the action, and brought about the due consequence either in this life, or, at any rate, in the life to come. This invisible force was designated by them as *Apūrva*, which is thus explained by Mr. Colebrooke than whom no European writer had better understood the true spirit of Hindu Legal Philosophy. "The subject" says Mr. Colebrooke, "which most engages attention throughout the *Mīmāṁsa*, recurring at every turn, is the invisible or spiritual operation of an act of merit. The action ceases, yet the consequence does not immediately arise ; a *virtue* meantime subsists unseen, but efficacious to connect the consequence with its past and remote cause, and to bring about, at a distant period or in another world, the relative effect. That unseen virtue is termed *Apūrva*, being a relation superinduced, *not before* possessed." By the introduction of this theory of *Apūrva* or invisible force, the *Mīmāṁsakas* sought to escape from the admission of a *Deus ex machina* which they considered to be unnecessary or untenable. This has led some to suppose that the *Mīmāṁsā* system of Jaimini was atheistic in

its character, but Mādhavācāryya in his *Saṁkaravijaya* maintains that it was not Jaimini's intention to deny the existence of God, but merely show that the nonscriptural arguments advanced by the *Vaiśeṣikas* to establish his existence were in themselves insufficient and inconclusive. However that may be, this impersonal conception of the law bases its obligatory character upon the inscrutable authority ascribed to the *Śāstras*, as explained above, and operates upon human will by maintaining that *Śāstric* injunctions and prohibitions show us the true way and give us the sure warning that the adjustment of our actions in accordance with them will lead to welfare and their violation to its reverse.[30]

Having thus traced the source of the authority of Hindu Law in the sanction which it carries along with it, let us now consider how that portion of it which may be characterised as positive law, and with which we are more directly concerned in the treatment of our subject, differentiates itself from the other portions which deal with ceremonial rules and moral and religious injunctions. The true explanation of this is to be found in the special function of the king in the Hindu polity. While the law directs an individual to do certain things and avoid certain others, it directs the king in addition to his other duties to take steps that the law may be respected and obeyed, and to mete out punishment to those who in violation of the law inflict injury upon others ; the positive law may be said to comprise that portion of the law the violation of which calls for the interposition of the king in order to provide an adequate remedy to the injured party, or chastise the delinquent for his transgression, or, in other words, it is that portion of the law which is enforced by the king. So *Yājñavalkya* declares,—"if a person, molested by others in a way

30. It may be added in this connection that the Sāṁkhya system agreed with, but the Vedānta differed from the Mimāṁsā theory regarding the admissibility of dependence on divine causation in explaining the fruition of human actions. Mādhavācārya in his commentary on the *Parāparaśmṛti* tries to reconcile the Vedāntic and the Mīmāṁsaka doctrine by maintaining that the apparent conflict between them should be understood as due to the different aims and scopes of those two systems :

vivakṣāviśeṣena tatsamādhānāt.

which contravenes the *Smṛti* or established usage, complains to the king, that gives rise to a topic for a judicial proceeding,"[31] and this implies three characteristic elements, *viz.*, (i) transgression of law as laid down in the *Smṛti* or established by usage, (ii) injury to some one other than the transgressor, and (iii) intervention of the king in his judicial capacity. If these elements are duly considered, I hope it will be found that the Hindu conception of positive law was not very different from the modern or Austinian conception thereof. In the first place it emphasises that 'law was added because of transgressions'; in the second place it shows that intervention of the king is called for because and in so far as these transgressions cause injury to people other than the transgressors; and in the third place it indicates that whether the transgression be of some rule of action laid down in the *Smṛtis* or of some established usage, in either case it is the intervention of the king, who is the protector of the people and dispenser of justice, that converts religious or customary law into positive law. The only point of difference between the Hindu view and modern or Austinian view are, that while according to the latter view, law, in its normal form, consists of commands issuing from the king, and the duty of enforcing the same is a self-imposed duty, according to the former view, the law issues from a source superior to the king, and the duty of enforcing the same is cast upon him from above, so that the infliction of punishment is itself regarded as a *Dharma* as indicated in the well-known text of *Manu*, "penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have recognised punishment itself as a form of *Dharma*."[32]

31. Smṛtyācāravyapetena mārgeṇādharṣitaḥ paraiḥ/
Āvedayati ced rājñe vyavahārapadaṁ hi tat// *Y. S*, II.5.

32. Daṇḍaḥ śāsti prajāḥ sarvāḥ daṇḍa evābhirakṣati/
Daṇḍaḥ supteṣu jāgarti daṇḍaṁ dharmaṁ vidur budhāḥ//
M.S, VII.15.

Hindu *Śāstra* records in an interesting way how the question of *Daṇḍa* arose in the society. Thus we find in the *Nāradasmṛti*:

Dharmaikatānāḥ puruṣāḥ yadāsan satyavādinaḥ/
Tadā na vyavahāro'bhūn na dveṣo nāpi matsaraḥ//

It may be noticed that there is a wide-spread idea, from which even well-known writers and reputed scholars are not entirely free, that the main function of Oriental Empires was the gathering of taxes and the levying of armies, and that they seldom concerned themselves with the enforcing of legal rules; but so far as India was concerned, a study of its ancient institutions, as disclosed in the works of the sages, at once demonstrates that nothing could be farther from the truth, for such a view really reverses the true order of things. According to the Hindu conception, it was the protection of the people, and not the collection of taxes, that was regarded as the principal duty of the king, and the administration of justice was one of the principal means to keep the people in order and to protect them in the proper enjoyment of their rights; of course the king had a right to collect taxes, but the right involved a corresponding obligation to afford protection to those who paid them, and whoever failed to discharge the obligation while enjoying the advantages of the right was condemned in no doubtful terms. Thus it is declared: "a king who without protecting his subjects collects revenue from them may be said to be the collector of all the impurities to which they are subject";[33] to the same effect is the following text of *Yājñavalkya* which lays down that 'whatever sin the people commit being unprotected by the king, half of that goes to the king since he takes revenue from them."[34] It was, thus, one of the principal duties of the king to administer justice among his people, for administration of justice and maintenance of order

Naṣṭe dharme manuṣyāṇāṁ vyavahāraḥ pravartate/
Draṣṭā ca vyavahārāṇāṁ rājā daṇḍadharaḥ smṛtaḥ// *N.S.*, I.1-2.

For an identical verse vide *Bṛhaspatismṛti*; 'Dharmpradhānāḥ puruṣāḥ...' On *Daṇḍa* the following books deserve special mention: *Daṇḍaviveka* of Vardhamāna, (G.O.S., 1931); *History of Dharmaśāstra*, III. 388ff; Mm. Yogendra Tarkatīrtha, *Prācīna Bhārate Daṇḍanīti*, (Calcutta, B.Y. 1365). Vide in this context the details relating to *Rājadharma* in Kane's *History of Dharmaśāstra*, Vol. III.

33. Arakṣitāram rājānaṁ baliṣaḍbhāgahāriṇam/
Tam āhuḥ sarvalokānāṁ samagramalahārakam//

34. Arakṣyamāṇā kurvanti yat kiñcit kilbiṣaṁ prajāḥ/
Tasmāt tan nṛpater ardhaṁ yasmāt gṛhṇāty asau karān//
Y.S., II.337.

go hand in hand, and one cannot conceive the one without the other. It was not, however, his function to legislate except in minor matters of local or temporary importance ; the general body of the law was contained in the *Śāstras*, and their exposition was in the hands of learned Brahmans who, by reason of their piety and intellectual eminence, were specially fitted for the task. This is not the place to pause and consider how far this bifurcation of functions was conducive to the welfare of the community, but it certainly kept up the idea of sacredness which the Hindus attached to their law as emanating from a higher wisdom and not originating from the fiat of the royal will, although enforced by the temporal power which was vested in the king.

Having thus considered the source from which the Hindu Law derives its authority, I will next endeavour to fix the limits of my subject by laying down an orderly scheme of discussion. The subject is a vast one, and it is apparent that it cannot be conveniently treated without appropriate arrangement and division. Let us, therefore, consider how best we can arrange and divide the subject of our discourse. I have already stated that the sphere of *Dharma* as dealt with in the *Dharma-śāstras*, includes a good deal more than positive law which furnishes the subject-matter of jurisprudence ; it may, therefore, be reasonably inferred that the classification of *Dharma*, taken in its broadest sense, as given by the commentators is not likely to serve the purpose of an adequate classification for positive law. Take, for instance, the sixfold division of Dharma[35] as stated by Medhātithi in his commentaries on the Institutes of Manu and Vijñāneśvara in his commentaries on the Institutes of Yājñavalkya. The six divisions of *Dharma* are : (i) *Varṇa-dharma* or duties peculiar to the several castes, (ii) *Āśrama-dharma* or duties relating to the several stages of life, (iii) *Varṇāśrama-dharma* or duties appropriate to the several castes in relation to the several stages of life, (iv) *Guṇa-dharma* or duties of special quality arising from special position, (v) *Nimitta-dharma* or secondary duties arising, for

35. Vide the commentary of the *Manusmṛti* on II.25, and the *Mitakṣarā* on *Yājñavalkyasmṛti*, regarding the sixfold divisions of *Dharma*.

instance, from the nonperformance of primary duties, and (vi) *Sādhāraṇa-dharma* or duties of general obligation, and it is apparent that this classification is not at all appropriate to our purpose, being based upon a principle of division which cannot be adapted to jurisprudence. In the Institutes of Yājñavalkya we find *Vyavahārādhyāya* or chapter on positive law separated from *Ācārādhyāya* or chapter on rituals and *Prāyaścittādhyāya* or chapter on expiation ; this division has the merit of discriminating positive law which has to be administered or enforced by the king in his judicial capacity from other topics discussed in the *Dharma-śāstras,* and is calculated to save a student of Hindu jurisprudence from a good deal of confusion ; it must, however, be remembered that the chapter on rituals is not completely foreign to jurisprudence as there are certain rituals, such as marriage and adoption which create juristic relations and thereby produce, in an indirect way, certain juristic results. The main question, however, is how to divide the subject-matter of positive law so as to base thereon an orderly treatment of the general principles of Hindu jurisprudence. In considering this question, one primary distinction at once suggests itself to us, viz., the distinction between substantive law and adjective law, and it is a distinction which was recognised by our jurists, who dealt with adjective law under the head of *Vyāvahāramātṛkā* as distinguished from the different topics of substantive law which were treated after it in the order of discussion. For our purposes, however, I propose to deal with substantive-law before I take up the discussion of adjective law, for some knowledge of the former division seems to be a necessary preliminary to the proper understanding of the latter. The next question is, how to divide the sphere of the Substantive Law itself ; it appears that the principal commentators and writers on Hindu law, who have dealt with positive law as a separate and relatively independent branch of study, have generally followed the division of topics of litigation as given by Manu in the following passages : "Of these forms of action, the first is the recovery of debts ; the others are, (2) deposit, (3) sale by one who is not the owner, (4) partnership, (5) resumption of gift,

(6) non-payment of wages, (7) transgression of compact, (8) rescission of purchase and sale, (9) dispute between the master and the herdsman, (10) boundary-dispute, (11) personal violence, (12) verbal abuse (including defamation), (13) theft (including other cognate cases involving deceit), (14) violent crimes involving the use of force (such as robbery), (15) seduction of women (including adultery), (16) mutual duties of husband and wife, (17) partition of heritage, and (18) gambling and betting,—these are the eighteen topics on which litigation rests" ; [36] and Bṛhaspati said that 'those who were true examiners would find these eighteen topics enumerated in the *Dharma-śāstras* at the root of every possible litigious dispute,"[37] thereby implying that on careful analysis all seemingly different causes of action might be resolved into these. No doubt it was early recognized that in the diversity of human transactions the eighteen topics mentioned above were capable of being subdivided into numerous branches as Nārada and Kātyāyana expressly declared, but the eighteenfold division was in the main retained with very little modification, perhaps the only modification which is worth mentioning being the introduction of a chapter dealing with nonservice by one who has accepted

36. Teṣām ādyam ṛṇādānaṁ nikṣepo'svamivikrayaḥ/
Sambhūya ca samutthānaṁ dattasyānapakarma ca//
Vetanasyaiva cādānaṁ saṁvidaś ca vyatikramaḥ/
Krayavikrayānuśayo vivādaḥ svāmipālayoḥ/
Sīmāvivādadharmaś ca pāruṣya-daṇḍavācike/
Steyañ ca sāhasañ caiva strīsaṁgrahaṇam eva ca/
Strīpuṁdharmo vibhāgaś ca dyūtam āhvaya eva ca/
Padāny aṣṭādaśaitāni vyavahārasthitāv iha//

M.S, VIII. 4-7.

Vide also *Manu*, VIII.8 : 'eṣu sthāneṣu bhūyiṣṭham...' etc. on which Medhātithi comments : anye'pi vyavahārahetavaḥ santi. Yathā nivasanārthaṁ tvayā me veśma dattaṁ tatra kim ity arvāk saṁvatsarāt anyasmai dadānīti ; na cedaṁ dattānapakarma. Na hy atra svatvanivṛttir asti bhogānujñāmātraṁ vasataḥ. Vide also the notes by Kullūkabhaṭṭa : bhūyiṣṭhaśabdena anyāny api vivādapadāni santīti sūcayati. Tāni ca prakīrṇakaśabdena nāradādyuktāni. For informative discussion on the classification vide, Kane, *History of Dharmaśāstra*, III, 248ff.

37. Padāny aṣṭādaśaitāni dharmaśāstroditāni ca/
Mūlaṁ sarvavivādānāṁ ye vidus te parīkṣakāḥ// *Bṛh.S.*, 1.16.

service, and of another dealing with miscellaneous obligations towards the king which did not readily come under any of the topics enumerated above, and for the violation of which the king, of his own motion, might call the transgressor to account. On the whole, therefore, it must be admitted that the division of the subject-matter of substantive law into eighteen topics, as indicated above, has the sanction of antiquity and general recognition, but one cannot fail to observe that it does not bear the impress of any scientific principle of classification, but represents an enumeration of certain causes of action apparently taken at random, but, in all probability, chosen and grouped together because they frequently arose at that period of social evolution in which it was first introduced; when, however, it was adopted by Manu and sanctioned by his great authority, it tended to become stereotyped and was accepted by subsequent law-givers without much modification. It, therefore, follows that a logical and systematic discussion of juristic principles cannot conveniently follow the division and argument of topics indicated above, although the enumeration of causes of action contained therein may serve the purpose of a useful historical landmark showing the nature of the disputes that used to come up before a Court of Justice in those remote days, and may even be so explained as to include within its scope all possible legal disputes that may arise at any time. I am thus called upon to outline for myself a convenient method of arranging the topics of law treated by the law-givers in order that I may adopt it for the purpose of an orderly discussion of the principles of Hindu jurisprudence, and this I will now proceed to do. I have already noticed the striking distinction between the substantive law and the adjective law, and stated that in the order of treatment the former branch should find a place before the latter. Dealing next with the substantive law, one is at once reminded of the distinction drawn by the Roman jurists between the law of things (*jus quod ad res pertinet*) and the law of persons (*jus quod ad personas pertinet*) including within the latter branch what the German writers call '*Familien-recht*' or the law of the family meaning thereby that portion of the substantive law which

deals with the special rights and obligations arising from special conditions of family relationships, and I propose to adopt it as a very convenient, though not a scientifically accurate, principle of classification. It should, however, be noted that there has existed some doubt as regards the position of the law of succession and of the law of obligations within this scheme ; as regards the law of succession, in as much as succession is one of the modes of acquisition of ownership, I consider it proper to include it within the part dealing with law of things, although being founded on personal relationship it may have some affinity to the law of the persons, and as regards the law of obligations I prefer to class it apart. To these must be added the law of crimes, which, being regarded as a part of the public law, is generally considered to be outside the above mentioned divisions : I am, however, disposed to think that as the law of crimes bears a strong affinity to the law of torts which, although generally regarded as a part of the law of obligations, was not, under the Hindu law, sharply discriminated from the same, it may not be inconvenient to separate the law of torts from the law of obligations and discuss it along with the law of crimes, thereby confining the law of obligations to rights and duties arising from contracts as distinguished from delicts or wrongs. In the result, the divisions thus obtained may be arranged as follows :

A. Substantive Law : (1) The Law of things dealing with (a) ownership, (b) pledge, (c) various kinds of bailment, and (d) such other rights over things as are not included in the above.

(2) The law of persons dealing with (i) the law of special status or conditions which may be distinguished as (a) parental and quasi-parental, (b) marital and quasi-marital, and (c) dominical, and (ii) the law of defective status of condition arising out of infancy, insanity, etc.

(3) The law of contractual obligations dealing, for instance, with recovery of debts, recovery of wages, partnership, suretyship, and transgression of compact.

(4) The law of torts and the law of crimes.

B. Adjective Law : Including the law of procedure, the law of evidence, and the law of sanctions and remedies.

Acting upon this arrangement of topics, I may divide and distribute the proposed course of lectures in the following way :

Lecture II. —Ownership : its nature and the modes of its acquisition.
Lecture III. —Transfer of ownership (including the law of gift and the law of sale).
Lecture IV. —The law of prescription.
Lecture V. —The law of succession.
Lecture VI. —The law of pledge.
Lecture VII. —The law of bailments and other incorporal rights.
Lecture VIII.—The law relating to parental and quasi-parental relationship.
Lecture IX. —The law relating to marital and quasi-marital relationship.
Lecture X. —The law of dominical relation, and the law of defective status in general.
Lecture XI. —The law of contractual obligations.
Lecture XII. —The law of torts and the law of crimes.
Lecture XIII.—Adjective law.
Lecture XIV. —Concluding remarks.

Having thus outlined the scheme of my future lectures, I propose to conclude my introductory observations. I have not attempted in this lecture to anticipate any of the discussions which will be elaborated in their proper places in the following lectures, for, the introduction of inadequate accounts of subjects which will be fully treated afterwards is not only superfluous, but may also be productive of wrong impressions. All that I can at present do is to express a confidence that whoever will patiently follow the account of Hindu Jurisprudence, as contained in the following pages, will be convinced that much of the hostile aspersion that has been cast against Hindu Law by some able but ill-informed critics is the result of ignorance and prejudice acting and reacting upon each other. I do

not, of course, mean to assert that Hindu Jurisprudence was in all respects as perfect as one could desire, but I hope to be able to show that, in the main, it will not compare unfavourably with even the most developed system of ancient Jurisprudence, the Roman. The assertion may seem to be somewhat too bold, but I do not see any intrinsic improbability about it and I hope that those, who know anything about the contributions of the Hindu mind in other departments of knowledge, will not meet it with irrational scepticism. As regards those who go into raptures at the bare mention of the Twelve Tables, but shake their heads at the mention of the name of Manu, and talk about 'feeble civilization' and 'cruel absurdities' without feeling the absurdity of criticising upon a subject which they had no opportunity to study, I am content to leave them to their convictions, and to the satisfaction which they derive from the same.

LECTURE II

OWNERSHIP* : ITS NATURE AND THE MODE OF ITS ACQUISITION

Ownership : what it means—Difference between ownership and property —Śiromaṇi's view—Recognised definition of property—According to Śrīkṛṣṇa Tarkālaṇkāra—controversy about the view that property is exclusively indicated by Śāstras. Jīmūtavāhana and Vijñāneśvara—Objection to Vijñāneśvara's view—(*a*) 'Fitness for free disposal' is not a sound test—(*b*) Śāstric rules become unnecessary—'Fitness for free disposal' special significance of the word 'fitness'—Austinian conception of property compared—Qualified property—Śrīkṛṣṇa's view—The nature of king's right in the soil—Mīmaṁsa—Nīlakaṇṭha.—Śrīkṛṣṇa—Jagannātha—Śāstric means of acquisition of ownership—Manu—Gautama—Nārada—Enumeration of means not exhaustive—Modes of acquisition of ownership—*Parigraha*—Manu—*Adhigama* : finding of treasure troves—Shares of the King and finder—Treasure trove not *res-nullius*—Comparison with rules of Roman and English Law—Difference between treasure-troves and articles lost by one and found by another—Refinement introduced in *Mitākṣarā*—*Vijita* : or conquest of war. Not *res-nullius* as in Roman Law—Extent of right of conquest : private property not interfered with—*Prayoga* : or application of pre-existing property—*Accessio* in Roman Law—Offsprings of animals and produce of and accessions to land belong to the owner of the animal and the land—Exception—Comparison with Roman Law—*Karmayoga* or employment of work.

IN THE PREVIOUS lecture I have explained the scope of Hindu Jurisprudence, and set forth a scheme for the discussion of the various topics which require consideration. The first of these topics is ownership, which is acknowledged on all hands to be one of the fundamental juristic conceptions common to all systems of law. I will, therefore, endeavour to place before

* For a clear concept of ownership reference should be made to the following texts : Josef Kohler, *Philosophy of Law*, Modern Legal Philosophy Series, Vol. XII.

Salmond, *Jurisprudence* (Chap. XII. pp. 339-340), IXth edition, 1937.

P. V. Kane, *History of Dharmaśāstra*, III, 47 ff.

J. D. M. Derrett, '*The Development of the Concept of Property in India,*

you in this lecture an exposition of the conception of ownership as understood by the Hindu Jurists, and also explain some of the modes in which it could be acquired according to the Hindu Law-givers.

In analysing the conception of ownership, we at once see that it is based upon the distinction between persons and things, and implies a certain peculiar kind of relation between them ; this relation, whatever its exact character may be, is capable of being viewed from two different stand-points ; on the one hand, we may start with the 'persons' in whom a bundle of rights constituting ownership inheres in relation to particular things ; on the other hand, we may take up the 'things' as they are, and view them as subject to a special kind of control from particular individuals, which makes us regard those 'things' as the property of those individuals. The idea which underlies the conception of ownership (*svāmitva*) on the one hand and the conception of property (*svatva*) on the other, is fundamentally the same, so that they may be regarded as mutually inter-dependent correlatives connoting two difierent aspects of the same identical relation ; ownership, therefore, may be said to inhere in persons in relation to things in so far as they are objects of ownership, and property may be said to characterise things in so far as they stand related to persons who are their owners.

The distinction and inter-connection pointed out above between the conceptions of ownership (*svāmitva*) and property (*svatva*) is, I need hardly say, fully recognised and explained by Hindu Jurists with their usual analytical subtlety, and they point out that the correct logical way of comprehending them

c. A.D. 800-1800' in Zeitschrift fur Vergleichenda Rechtswissenschaft, (64/62) ; '*An Indian Contribution to the Study of Property*' in Bulletin of the School of Oriental and African Studies, (XVIII/3, 1956).

Prof. Derrett in his article makes specific reference to the following texts which deal with the concept of property : F. de Coulanges, *Origin of Private Property*; P. Lafargue, *Evolution of Property*, (5th Edn. London, 1908); C. J. M. Letourneau, *Propery, its Origin and Development*, (trans.), (London, 1892) ; E. Beaglehole, *Property*, (London, 1931); P. Jaure, Propriété (Paris, 1935).

both is to regard the one as the determinant of the other, so that if you start with ownership as a peculiar condition of the person in whom it inheres, it should certainly be regarded as having a determinate character in so far as it is related to the thing which thereby becomes the property of that person ; for ownership in the abstract has no meaning apart from its object. This inter-relation between the conceptions of ownership and property is characterised by Hindu Jurists as mutual determination (*nirūpya-nirūpaka-bhāva*).

I have introduced this discussion at the outset in order to make it clear that an exposition of one of these two conceptions necessarily explains the other, in as much as they are but two aspects of the same idea, just as fatherhood and sonship which designate the same relationship viewed from opposite sides.

Having thus explained the inter-relation between the conceptions of ownership and property, I will next proceed to explain what is meant by them. But before I do so, it may not be out of place to observe that although ownership inheres in the person, and property in the thing in relation to the owner, neither of them can, in the opinion of Śiromaṇi, be regarded as falling within the classification of categories[1] (*padārtha*), recognised by the Vaiśeṣikas ; an exhaustive enumeration and exposition of these two categories is beyond the scope of these lectures and I do not propose to undertake this task ; it will be sufficient to point out that what is chiefly meant by this remark is that 'ownership' on the one hand, and 'property' on the other, represent a superinduced relation between the person who owns and the thing that is owned not included within the essential attributes, which characterise the person and the thing respectively ; so that they cannot be regarded as attributes (*guṇas*) of either the person or the thing. Hence arises the necessity of admitting an additional category (*atiriktaḥ padārthaḥ*) supplementing the sevenfold division of the Vaiśeṣikas, to indicate that the conception of ownership or property is an outcome of social evolution

1. Dravyaṁ guṇās tathā karma sāmānyaṁ saviśeṣakam/
Samavāyas tathābhāvaḥ padārthāḥ sapta kīrtitāḥ// *Bhāṣāpariccheda*, Kā, 2.

which clothes the persons with a bundle of rights in relation to things which are objects of ownership. It is, however, unnecessary to enter into the intricacies of these discussions which can be properly understood only by those who are sufficiently acquianted with the Hindu Philosophical systems, and I merely indicate them as testifying to the deep logical insight with which the Hindu Jurists pursued these discussions. It may be easy to scoff at these niceties, but it is not quite so easy to understand them or to help admiring the subtlety of logical acumen displayed by those who introduced them.

Leaving behind these logical niceties, I will now proceed to explain what the term property (*svatva*) signifies, or in other words, what is meant when it is said that a particular thing is the property of a particular person. Śrīkṛṣṇa Tarkālaṅkāra in his commentary on the *Dāyabhāga* says that according to the old established explanation it signifies fitness for free disposal as indicated by the *Śāstra*.[2] If you analyse this definition, you will at once find that it consists of two distinct elements which may be treated separately, viz. (1) that the idea of property is exclusively indicated by the Śāstra (*śāstraikasamadhigamyatva*) and (2) that it signifies fitness for free disposal by the person who owns it (*yathecchaviniyogārhatva*). I will now proceed to deal with these two elements separately.

(1) According to some Hindu Jurists the idea of property is exclusively indicated by the Śāstras and ownership can only be a acquired in the modes recognised by them.[2a] This view is advocated by Dhāreśvara, Jīmūtavāhana and their followers. On the other hand Vijñāneśvara and his followers maintain that the idea of property has its basis on popular recognition without any dependence on *Śāstras*, the object of the rules laid down in the *Śāstras* about the modes of acquisition of ownership being to collect and prescribe those means of acquisition recognised by popular usage that are regarded as commendable and as such worthy of being pursued. This

2. Svatvañ ca yatheṣṭaviniyogārhatvena śāstrabodhitatvam iti prāñcaḥ.
Commentary on Dāyabhāga, p. 11.

2a. For detailed discussion on this point vide the commentary of Vijñāneśvara on the introduction to the *Yāj. Saṁ.* II.114.

latter view is denominated as *laukika-svatvavāda i.e.*, the doctrine that property has its basis on popular recognition. It is not possible within the short scope of this lecture to enter into a detailed examination of this remarkable controversy, and all that I can attempt to do is to present before you an idea of the controversy with some of the arguments advanced by the disputants in support of their respective opinions. The real point in the controversy resolves itself into this : there are certain modes of acquiring ownership recognised by the people on all hands ; they are also the modes laid down in the *Śāstras* as leading to acquisition of ownership. Now, the question is, which is prior ? Do the *Śāstras* merely summarise the modes of acquisition of ownership which they find already recognised in popular usage, or does the popular usage merely follow and give effect to the Śāstric rules laying down the conditions for the acquisition of ownership ? Dhāreśvara and Jīmūtavāhana advocate the latter view, while Vijñāneśvara and Mitramiśra maintain the former. I need hardly say that I feel inclined to give preference to the former view as more consonant with reason and common sense ; let us, however, examine some of the objections advanced in opposition to this view.

(*a*) It has been objected that if 'fitness for free disposal' is what, according to you, characterises the conception of property without any reference to the Śāstric rules regula ing the acquisition of ownership, then, how is it that you do not ascribe ownership to the thief over the stolen articles which are as much within his control as any other thing acquired by honest means ? It will not do to say that the thief cannot freely dispose of the stolen articles for fear of detection and consequent punishment, for even an honest owner cannot dispose of his property in any way he likes, in as much as his power of free disposal is to some extent limited by Śāstric injunction, as for instance, he cannot set fire to his own house so as to burn the houses of his neighbours ; in either case the exercise of the power of free disposal is in practice limited to some extent, but the power is there, and no one can stop its exercise provided the person is prepared to pay the penalty

for the same. The shortest answer, however, to this objection seems to be that it is altogether erroneous to assume that popular usage recognises the thief as the owner of the stolen articles, so that it is unnecessary to seek the assistance of Śāstric injunctions to establish that theft causes no transfer of property, although the real owner, so long as he is unable to trace the articles, loses his control over them ; if this loss of control argued loss of ownership, you might as well maintain that a person who left his home and went to a distant land, thereby lost his ownership over everything which he left behind him.

(*b*) It may, however, be asked that if the different modes of acquisition of ownership are recognised in popular usage without any reference to Śāstric rules, then why is it that the *Śāstras* quite unnecessarily lay down those rules prescribing various modes in which ownership can be acquired ? Surely, it is not reasonable to suppose that the *Śāstras* would undertake the quite unprofitable task of repeating without any purpose what is otherwise well-known to the people, so that those who assert that the various modes of acquisition of ownership are developed out of popular usage and recognised by the people without any reference to the *Śāstras* must explain the object which those rules are calculated to serve, and thereby justify their insertion into the *Śāstras*. To this it may be replied that it cannot be said that even a bare collection of rules which we find recognised by popular usage is altogether unprofitable, for a scientific presentation of such rules is not without its value, and it is widely recognised that a good portion of what is called positive law consists of rules collected from popular usage set forth in well-defined and systematic forms. Moreover, it may be pointed out that a specification in the *Śāstras* of some of the recognised modes of acquisition of ownership does not amount to a mere useless repetition of what is already recognised by popular usage, for it serves the useful purpose of enunciating the approved methods of acquisition of ownership, and thereby indirectly reprobates those other methods of acquiring property which are opposed to directions contained in the texts of the Śāstras, in other

words, although these texts may not exhaustively enumerate the methods of acquiring property which are to be gathered from popular usage, yet they may have as their object the useful end of regulating human conduct by indicating what courses may be pursued and thereby indirectly suggesting what courses should not be pursued by people belonging to several castes in their endevour of acquire property.

To illustrate this view, the *Vīramitrodaya* refers to the rule laid down in the *Śāstras* that a man should take his food with his face turned towards a particular direction ; this does not signify that whoever violates this rule does not enjoy his meal or satisfy his hunger, but it merely indicates that an infringment of the rule is not conducive to welfare ; similarly, when the *Śāstras* point out certain modes of acquiring property and give specific directions about them, it does not follow that ownership will not arise unless those directions are strictly complied with, but all that may be inferred is that a violation of those directions is not proper, and should be avoided as far as possible. In other words, acquisition of ownership is not an outcome of Śāstric injunctions ; they are not creative, if I may use the expression, but are partly illustrative and partly regulative in their character.

Having thus answered the objections of the other side, the supporters of the doctrine that the growth of ownership is an outcome of social evolution and not a deduction from Śāstric injunctions urge that the very fact that the conception of ownership is not confined to the people who recognise the authoritative character of the *Śāstras* furnishes a strong argument in support of their position ; this argument seems, at the first sight to be almost unanswerable, but it may perhaps be replied that although there are people who do not revere the *Śāstras* prevalent among us, yet they have got some authoritative works among them which supply them with their law, so that the controversy discussed above does not become impossible even with them. Understood in this wider sense, the controversy appears to resolve itself into a question regarding the relative priority between the unwritten rules about the acquisition of property evolved by the popular

mind and observed in popular usage, and the written rules inculcated and systematised in authoritative works on positive law. When we come to consider the question carefully from this stand-point, it seems difficult to deny that in the order of evolution the unwritten rules evolved by popular mind occupy a prior position, although they may be subsequently moulded and modified by written works of acknowledged authority, and this seems to be the opinion more widely recognised among the Hindu Jurists. I have already mentioned that Vijñāneśvara and his followers, such as Mitramiśra, advocate this view; I may also add that renowned Mīmāṁsakas, such as Guru, Kumārila Svāmi and Pārthasārathi Miśra are also of the same opinion.

(2) Having discussed the first of the alleged characteristic elements in the definition of property mentioned above, I now pass on to consider the second element, viz. 'fitness for free disposal.' It is important to notice in this connection the special significance of the word 'fitness' used as a part of the above definition; it is not denied that in actual practice it is found that disposition of property by the owner is not absolutely capricious, but is regulated to some extent by the motives furnished by the control exercised by the king and by the Śāstric injunctions; still this admission does not militate against the view that the term 'property' cannotes fitness for free disposal; for although my dealing with my property may not be absolutely unfettered by the considerations indicated above, yet that does not imply that I have not got the power to deal with my property in any way I like, or, to put it in another way, that my 'property' is not, by its very nature, liable to be disposed of by me according to my will. Hence the *Vīramitrodaya* observes that if an unrighteous man disposes of his property in a way prohibited by the *Śāstras*, he may be commiting a sin by reason of his violation of the prohibition, but it cannot be said that his action is not an exercise of his proprietary right; or, to look at the matter from another stand-point, although a man may, and usually does, refrain from dealing with his property in a way prohibited by the *Śāstras*, it cannot be said that his

proprietary right did not extend to invest him with the power of acting according to his pleasure in relation to his property, provided he was prepared to undergo the penalty consequent upon the infraction of the Śāstric prohibition. Hence it follows that although in practice one's dealings with one's property are regulated by various considerations, yet the word 'property' in its fullest sense connotes fitness for free disposal by the owner, and ownership implies, to borrow an expression of Dr. Holland, a plenary control over its object. To illustrate this view the *Vīramitrodaya* mentions the simile of a seed which contains within it the capacity to germinate and be converted into a sprout; this capacity may, in individual cases, be impeded by extraneous causes, but still it cannot be said that the capacity was not there and the seed was not, by its very nature, fit for developing into the shape of a young plant; similarly an owner may not actually exercise his power of dealing with his property unrestrained by the extrinsic considerations of prudence and propriety, but that dces not show that he was not invested with the power of disposing of his property according to his inclination, or that the term 'property' did not connote 'fitness' for free disposal by the owners. A practical application of this characteristic element in the conception of property will be found in the oft-quoted dictum of Jīmūtavāhana that 'a fact cannot be altered by a hundred texts'; a father, according to Jīmutavāhana, is the full owner of his property and his sons do not acquire any co-ownership with him by reason of their birth; now there are certain texts which prohibit the father from alienating certain kinds of his property without the consent of his sons; but this prohibition, argues Jīmūtavāhana, cannot have the effect of invalidating an alienation by the father in violation thereof, because the alienation becomes operative by reason of the ownership which inheres in the father to the exclusion of his sons, and 'a fact', he says, 'cannot be altered by a hundred texts.'

While explaining the conceptions of 'ownership' and 'property' according to the Hindu Jurists, one cannot help being struck by the similarity of their views on this point with those of some of the eminent western writers on modern Jurispru-

dence. Thus, in his lectures on Jurisprudence, Austin points out that "in the Institutes of Gaius and Justinian, the right of property or dominion is not defined at all. Things are described ; the modes of acquiring property in them are described ; servitudes are described ; but of the right of property or dominion no direct description is given", and he himself defines the term property or dominion as being "applicable to any right which gives to the entitled party an indefinite power or liberty of using or dealing with the subject". (Lecture XLVIII). Similarly, Dr. Holland defines ownership as "a plenary control over an object", but he points out at the same time that in accordance with the maxim '*sic utere tuo ut alienum non laedas*', it must always be enjoyed in such a way as not to interfere with the rights of others (Chap. XI). It is hardly necessary to point out how closely these definitions approach the view of the Hindu Jurists which I have tried to lay before you in the foregoing exposition. The resemblance is not confined merely to the definitions, but also extends to the limitation indicated in the latter part of the passage quoted from Dr. Holland's Jurisprudence, for this limitation is ultimately reducible to the control exercised by the king and by the Śāstric injunctions, which is fully recognised by the Hindu Jurists, as already pointed out. On the whole, therefore, I may trust that I shall not be accused of an idle pride in the merits of these discussions introduced by the Hindu Jurists, if I affirm that in point of logical subtlety and analytical skill they have scarcely been excelled even by the most modern exponents of Western Jurisprudence.

It will be seen that in the above exposition of the conceptions of ownership and property I have taken those terms in their strictest sense ; it must not, however, be thought that the Hindu Jurists did not acknowledge that the unfettered power of using or dealing with one's own property, which constitutes ownership in the strictest sense, is susceptible, under special circumstances, of being limited or circumscribed to various extents, for, as a matter of fact, the Hindu Law does recognise the existence of qualified ownership of property, and the restriction upon the right of free disposal may even

go so far as almost to deprive the owner of his right of alienating the property according to his choice. Thus, a Hindu widow succeeding to the property of her deceased husband cannot ordinarily alienate that property except under certain special contingencies, which, for the sake of conciseness, are described by the expression 'legal necessity'. Now, is not the widow the owner of the property ? No doubt, she is, but her ownership does not fully correspond to the idea which I have tried to explain above, but is ordinarily limited to the right of enjoyment of the usufruct without detriment to or destruction of the corpus ; hence this kind of qualified property is said to imply fitness for enjoyment (*bhogopayogi-svatva*) as distinguished from fitness for free alienation.

So also Śrīkṛṣṇa Tarkālaṅkāra expressly recognises the existence of various concurrent rights to one and the same thing vested in different persons provided there be no incompatibility in the co-existence of such rights. He thus distinguishes between property of the same kind and property of different kinds, and maintains that the existence of the property of one kind in a particular person is incompatible with, and so excludes, the concurrence of the same kind of property in another person (*sajātīya svatvaṁ prati sajātīya-svatvaṁ virodhi*),[3] whereas there is no such incompatibility in the co-existence of different kinds of property in relation to the same thing residing in different individuals. This position involves the admission of diverse rights inhering in different persons constituting different fragments of the totality of rights comprised by ownership taken in its strictest sense ; when we use the term 'property' in relation to cases of this description, it is no doubt used in a qualified sense ; still the question may arise as to who should be regarded as the true owner of the thing, for, in strict legal parlance one of those persons should be treated as being the owner, and the other should be regarded as being invested with rights over the object in the ownership of the former. In most cases, the solution of this question is not found to be beset with much difficulty, for we can generally trace the mode in which these subordinate elements of owner-

3. Vide his *Commentary on Dāyabhāga*, p. 11.

ship constituting *'jura in re aliena'* have been carved out and transferred to different individuals, while the residuary right of ownership has remained where it was. There may, however, be cases where the question may not be altogether free from doubt or difficulty ; as an instance, I may refer to the interesting discussion about the nature of king's right in the soil within his dominion, which is owned and occupied by private individuals[4]. The discussion is contained in the *Viśvajidadhikaraṇa* of the *Mīmāṁsā*, and the more widely recognised opinion seems to be that the private individuals are the true owners of the soil, the title of the king being generally limited to the right of collecting revenue from them. Nīlakaṇṭha in his *Vyavahāramayūkha* and Śrīkṛṣṇa Tarkālaṅkāra in his commentary on the *Dāyabhāga* seem to endorse this view and regard the *bhaumikas* (landlords) as the real owners of the soil held by them, while they ascribe to the king merely the right to collect revenue from the landlords as representing his proper share of the produce of the soil to which he becomes entitled by reason of the protection which he affords to them in the peaceful enjoyment of their property. Jagannātha, however, seems to contend that, looking at the origin of the proprietary right, this limited conception of the right of the sovereign is not justifiable; he maintains that if ownership primarily arose from first occupation, it would be more reasonable to suppose that the sovereign being the stronger party, would have the prevalent right, such rights as the subjects possessed, being permissive in their character, and terminable at his option by the withdrawal of the permission at the end of the year. It is thus curious to observe that the more modern view gives a greater latitude to the rights of the sovereign as opposed to the rights of the people, and it may not be unreasonable to presume that this was to some extent due to the influence of foreign domination which had effected an alteration in the conception of sovereignty among the Hindus. The perplexity

4. Regarding the position of the king specially with respect to his right over the kingdom, vide, *Bulletin of the School of Oriental and African Studies*, Vol. XXII, 115 ; J. D. M. Derrett *Hoysalas*, 233f.; *'Development of the concept of Property in India*, c. A. D, 800-1800', p. 94, f.n. 318.

felt by Jagannātha was, however, mainly due to his attempt to go to the root of the matter, and determine how originally the rights of the sovereign came to co-exist with the rights of the subjects; and none of the various hypotheses which suggested themselves appeared to him to be altogether free from difficulty. If the ownership of the subject arose from occupancy, he argues, why could not the sovereign prevent it by his superior power, or if it was due to a grant from the sovereign, what was the exact character of the grant? Questions of this kind are essentially speculative and are not at all easy to solve, so that the better course seems to be to confine our enquiry to the actual state of the ideas prevalent in a particular society at a particular stage of its evolution; and looking at the question from this stand-point, it seems that among the Hindus the property of the sovereign to the soil within his dominion in the occupation of private owners had at an early period been confind to the right of realising a certain share of the produce as revenue, as a recompense for the protection afforded by him. The view of Jagannātha that the private owners might be regarded as if they were so many lessees from year to year finds very little support from the *Dharma-śāstras* which, although they dilate upon the divine character of the sovereign and the reverence due to his position, do not furnish any basis for maintaining that he was the absolute master of his territory, free to deal with the lands within his dominion in any way he liked to the prejudice of the settled rights of his subjects. It must, however, be understood that I am not here speaking of king's private lands over which he had complete and absolute control; it may also be that with regard to lands within his dominion which had not been appropriated by private owners as their own, his right was supreme and superseded the claim of his subjects; but as regards lands under private ownership his right was limited by the concurrent rights inhering in private owners. How and why the right of the sovereign came to be limited in this way it is very difficult to explain, and I think it ought to be enough for us to take note that it was so. "This earth", says Jagannātha, "is the cow which grants every wish; she affords property

of a hundred various kinds (inferior, if the owner need the assent of another proprietor—superior, if his right precede assent) ; while she deludes a hundred owners, like a deceiving harlot, with the illusion of false enjoyment, for, in truth, there is no other lord of this earth but one, the Supreme Lord."

Having thus explained the correlated conceptions of ownership and property according to Hindu Jurists, I now proceed to deal with some of the means of acquisition of ownership recognised in the *Dharma-śāstras*. I have already stated that the enunciation of these means contained in the *Dharma-śāstras* was not meant to be exhaustive ; hence we find different lawgivers giving different lists which do not exactly agree. Thus Manu declares : "There are seven virtuous means of acquisition (of wealth),—inheritance, gain, purchase, conquest, application (of wealth), employment of work and acceptance of gifts from proper persons."[5] Gautama gives almost the same list with a little modification when he says that ownership arises from succession, purchase, partition, occupation (of unappropriated property) and finding (of hidden treasures or the like), to which may be added acceptance of gifts in the case of Brāhmaṇas, conquest in the case of Kṣatriyas, commerce and agriculture in the case of Vaiśyas, and wages of labour in the case of Śūdras[6]. Nārada enters into a little more detail, and says that there are twelve different modes of acquiring wealth of which three are general (*i.e.*, open to all castes), and the rest are peculiar to several castes. Succession, gifts of affection, and marriage presents received with the wife,—these are

5. Sapta vittāgamā dharmyā dāyo lābhaḥ krayo jayaḥ/
Prayogaḥ karmayogaś ca satpratigraha eva ca// *M.S.* X.115.

6. Svāmī riktha-krayasaṁvibhāgaparigrahādhigameṣu. Brāhmaṇasyādhikaṁ labdhaṁ kṣatriyasya vijitaṁ niviṣṭaṁ vaiśyaśūdrayoḥ. *G.D.S*, II.139-42

Vide here the explanation of the rule of Gautama in the Mitākṣarā on *Y.S*, II.

Vijñāneśvara in his commentary presents this view as the *prima facie* position. For elaboration and interesting details vide Kane, *H.D.S*, III, 548ff.

Vide also, Derrett, '*The Development of the Concept of Property in India*', 33 ff.

common to all the castes. There are three special sources of acquiring wealth in the case of Brāhmaṇas which are free from stain, *viz.* acceptance of free gifts, performance of priestly duties and receipts from disciples; similarly there are three special sources of wealth in the case of Kṣatriyas, *viz.* revenue, gains of war and penalties of law; so the Vaiśyas acquire wealth in three distinct ways, *viz.* through agriculture, herdsmanship and commerce; and the Śūdras gain wealth by serving the aforesaid three castes. These specific modes of acquiring wealth are proper for the several castes, and any contravention is reprehensible unless forced by pressing necessity. It is hardly necessary to point out that although the *Dharmaśāstras* lay down certain modes of acquiring property as specially appropriate to a particular caste, it is not thereby implied that any contravention of these directions will in any way affect the growth of ownership; for instance if a Brāhmaṇa instead of following the usual avocations of his own caste takes up those of a Vaiśya and becomes a cultivator, it must not be understood that the produce of his agriculture will not be his own, for, to adopt the terse and at the same time significant expression of Jīmūtavāhana, 'a fact cannot be altered by a hundred texts.' The real meaning of these rules is that such conduct as leads to a confusion of functions among the several castes is reprehensible unless justified by pressing necessity and ought to be avoided as much as possible.

I will now proceed to deal with some of the specific modes of acquisition of ownership indicated above, and among these the first that requires consideration is the one by which ownership is acquired in respect of a thing which had no previous owner. This is indicated by the word *parigraha* which literally means appropriation and is explained in the *Vīramitrodaya* as signifying the appropriation of previously unappropriated property such as straw, water, logs of wood, etc., from a forest which is open to the public as not being under the ownership of any particular individual[7]. The explanation above quoted does not limit the extent of *parigraha* or first appropriation

7. Parigrahaḥ pūrvam apareṇāsvīkṛtasyāraṇyādisādhāraṇa-pradeśa-sambandhinas tṛṇajalakāṣṭhādeḥ svīkīraḥ. *Vyavahāraprakāśa*, p. 415

as a means of acquisition of ownership, but indicates that it can only be effective in respect of things which are not already under the ownership of somebody else and that at the time when the *Vīramitrodaya* was written, the other, and if I may say so, older examples of its operation had become obsolete. It will perhaps be understood that in speaking of these examples, I am referring to the acquisition of ownership in a wild animal by the person whose arrow strikes it down, and in a previously unappropriated field by the person who first reclaims it and makes it fit for cultivation. I have said that these examples had become obsolete in the days of the *Vīramitrodaya* ; but this is saying a very little, for, as it seems to me, they had become obsolete even in the days of Manu. Thus in one passage Manu says, "Those who were versed in the ancient lore regarded this earth as the wife of its first king Pṛthu, and they declared that the field belonged to him who reclaimed it and the (hunted) animal to him whose arrow struck it down[8]." In this passage Manu distinctly traces the origin of ownership to what is called *occupatio* in Roman Law, and the way in which he puts it indicates that this was a view which was handed down to him from the past, but had very little practical application in his days when settled ownership was the rule and creation of first ownership in things which had no previous owner was only heard of in ancient traditions. It is therefore quite natural that we find very little upon this subject in the works of our law-givers beyond the enunciation of the general rule indicated above. It may, however, be interesting to notice that in the case of a hunted animal, Manu ascribes ownership to the person whose arrow first strikes it down, and the ownership of the land where the game is killed does not seem to affect the question. This seems to resemble the Roman Law which lays down that it is immaterial whether a man takes wild beasts or birds upon his own ground or that of another, and to differ from the English Law which does not seem to ascribe ownership to a trespasser who kills game on another person's land.

8. Pṛthor apīmāṁ pṛthivīṁ bhāryāṁ pūrvavido viduḥ/
Sthāṇucchedasya kedāram āhuḥ śalyavato mṛgam// *M.S*, IX.44.

I have already pointed out that Manu declared that according to ancient tradition ownership in a field belonged to him who first reclaimed it and brought it under cultivation. Sir William Markby, however, observes that "we find an example of occupancy without ownership in the (so called) Institutes of Manu. The ownership of cultivated land (as distinguished from the homestead and the pasture attached thereto) is not mentioned in that work; and as there are no rules as to how such land is to be disposed of when the family breaks up, it seems clear that when that book was written it was not owned but only occupied." I must confess that I find it extremly difficult to follow these observations, and it seems to me quite clear that there is no foundation for them. Manu distinctly speaks of the ownership of cultivated lands, and says that, according to ancient tradition, it arose originally from the reclamation of previously unappropriated waste lands; he further declares that as between the person to whom the field belongs and another who sows his seeds in it, the crops belong to the former, in the absence of a special contract under which both may become sharers in the produce,[9]—a proposition which may be compared to the well-known maxim *quicquid plantatur solo solo cedit.* In fact, Manu speaks more often about the ownership of cultivated fields than about the ownership of homestead and pasture grounds. I may, therefore, take this opportunity to warn you once for all against accepting upon trust the remarks of foreign writers upon Hindu Law, who, however eminent and able they may be in other respects, had very little first-hand knowledge of the subject of their discussion. I need hardly say that I have the highest respect for the spirit of research which these writers have evinced, but the materials at their command have often been of a very limited character, and very few of us, I am sorry to say, have taken the trouble to pursue their enquiries and correct their mistakes where necessary.

The next topic to which I will now turn is *Adhigama* or the

9. Ye'kṣetriṇo bījavanto parakṣetrapravāpiṇaḥ/
Te vai śasyasya jātasya na labhante phalam kvacit// *M.S*, IX.49.
Kriyābhyupagamāt tv etad bījārthaṁ yat pradīyate/
Tasyeha bhāgīnau dṛṣṭau bījī kṣetrika eva ca// *M.S*, IX.53.

finding of hidden treasures or the like, of which the owner is unknown.[10] The Law regarding treasure-trove is thus stated by Yājñavalkya (II.34-35): If the king discovers the treasure-trove, then he will take half and distribute the other half among Brāhmaṇs ; if a learned Brāhmaṇ finds it, then he may keep the whole himself ; in other cases, the king will give one-sixth to the finder, and take the rest himself ; but if the finder does not bring the fact to the notice of the king, then he will, on coming to know of it, extract the whole and also punish the finder. To this *Mītākṣarā* adds, on the authority of Manu, that even in such a case if the real owner comes forward and establishes his title, the king will restore the treasure to him after retaining one-sixth or one-twelfth for himself, or, according to Nīlakanṭḥa one-fourth for himself and one-twelfth for the finder. This latter direction clearly indicates that a trea-sure-trove must not be regarded as a *res nullius*, for although it may have remained unclaimed for a long time, still that cannot have the effect of extinguishing the title of the real owner ; at the utmost it can give rise to a presumption of abandonment which, however, is capable of being rebutted by the real owner.

It may be interesting to compare these rules with those of the Roman Law and of the English Law upon the subject. According to the Roman Law, if any treasure was found by the owner of the land where it lay concealed, he could keep the whole of it himself ; if another person found it, the finder and the owner of the land divided it equally. According to English Law, however, neither the finder nor the owner of the land had any interest in it, but it belonged entirely to the I may be wrong, but it strikes crown, and it was an offence not to give notice of its discovery. me that, taken as a whole, the rules laid down in the Hindu Law reconcile the rights of the King to unclaimed property within his dominion with the natural expect ations of the finder, which both the Roman Law and the English Law fail to do.

I may mention that there is a clear distinction between treasure-trove and articles lost by the owner and found by a stranger ; the distinction consists in this, that in the case of the former all hope of tracing the owner is lost, while in the

10. Adhigamo'jñātasvāmikasya nidhyādeḥ prāptiḥ. *Vyavahāraprakāśa*.

case of the latter it is not so. Hence, in the case of lost articles found by a stranger, the Hindu Law directs that the King must detain them in safe custody for some time awaiting the appearance of the owner to claim them ; if, however, nobody appears within that time to claim those articles, then the King may appropriate them for his own use after making over one-fourth to the finder. The period of detention is differently given, somewhere as one year and somewhere as three years, and the difference is reconciled by laying down that where the owner appears within one year he will get his articles back without any deduction, but where he comes forward after one year and within three years, the King will retain a small share as a charge for the detention out of which he will make over one-fourth to the finder. Here the *Mitākṣarā* adds a note that if the owner comes forward even after three years, and establishes his claim, the King shall restore the articles or their equivalents to him, for title, according to *Mitākṣarā*, cannot be lost by mere lapse of time. It is not necessary to consider the rules laid down upon the subject in the western legal systems, but it may be said without hesitation that the rules of the Hindu Law indicated above are on the whole as just and equitable as any that are to be found in the Western systems of Law.

I will next consider *Vijita* or conquest as a source of acquisition of property. According to the Roman Law the property of the enemy was regarded as *res nullius*, so that the victorious party could deal with it in any way they liked. Pressed to its fullest extent it leads to the conclusion that even the property of the private individuals in a conquered country can be freely disposed of by the conquering state, and no private rights can be set up against it. Our Hindu Law, however, did not recognise this fiction which is founded upon the assumption that the institution of private property falls into abeyance upon the outbreak of hostilities and explains a simple fact by what is less simple and less easily understood. According to the Hindu Law, conquest is an independent source of acquisition of ownership, and we need not seek to explain it by introducing the fiction that the ownership of the conqueror arise from a sort of '*occupatio*' in relation to the enemy's

property which, so far as the conqueror is concerned is to be regarded as nobody's property. Then further, the conquest, according to the Hindu Law, did not sweep away all private rights, its only effect being to invest the victorious King with the rights (and, I may add, with the obligations also) of the vanquished King, so that although the former might claim full ownership in the exclusive property of the latter, his right, so far as the property of the subjects were concerned, did not extend to anything more than the right of collecting revenue from them. So, Śrikṛṣṇa Tarkālaṅkāra distinctly says that the property (*svatva*) of a particular kind only excludes the property of the same kind (inhering in others), which implies that a king by his conquest acquires only the right of receiving revenue from the subjects of the conquired territory in relation to property lying within it which has devolved upon them by inheritance or otherwise[11], and Yājñavalkya broadly enjoins that 'a king bringing under his control a foreign territory becomes subject to the very same duties as are cast upon him in protecting his own state.'[12] Referring to the fact that the rules which International Jurisprudence derives from the positions of Roman Law, indicated above, 'have sometimes been stigmatised as needlessly indulgent to the ferocity and cupidity of the combatants', Sir Henry Maine observes that 'those who pass such strictures are unacquianted with the history of wars,' and 'are consequently ignorant how great an exploit it is to command obedience for a rule of any kind'. That may be quite true ; but the end of law is, I suppose to curb and control the natural passions of men, and we may sometimes be too prone to assume that they do not admit of any further regulation than what we already find ; at any rate we may be justly proud that the Hindu Law was less indulgent

11. Sajātīyasvatvaṁ prati sajātīyasvatvaṁ virodhi. Sajātīyeti karaṇāt parājitanṛpatirājyāntarvarti-tattatpuruṣīya-kramāgata-sthāvarādau jayādinā jetur nṛpateḥ karagrahaṇopayogi-svatvotpāde tathā krītapratigṛhīta-rājyāntarvartini tādṛśa-sthāvarādau kretrādeḥ krayādyadhīna-svatvotpāde' pi na vyabhicāraḥ. Śrīkṛṣṇa's commentary on *Dāyabhāga*, pp. 11-12 (Edn. Bharata Candra Śiromaṇi).

12. Ya eva nṛpateḥ dharmaḥ svarāṣṭraparipālane/
Tam eva kṛtsnam āpnoti pararāṣṭram vaśaṁ nayan// *Y.S.*, 1.342.

to the ferocity and cupidity of combatants and Sir Henry Maine, when he talked glibly of the 'feeble civilization' of the Hindus might well have taken notice of this.

Prayoga or application of already existing property is a source of new acquisition. Thus, if a field produced crops or a domestic animal bears offspring, the produce in each case belongs to the owner of the field or of the animal unless there has been some previous agreement modifying the general rule. This corresponds to what is called *accessio* in the Roman Law.

An analogous instance is furnished by what is called alluvion. The rules of the Hindu Law upon the subject seems to have been these : if a river which flows between two villages and forms the boundary between them encroaches upon one bank and attaches newly formed land to another, then the owner of the bank on which the formation takes place becomes entitled to it as an accretion to his property ; this sort of gain is characterised by Bṛhaspati as a gain due to good fortune ; he also lays down an exception to the rule, and says that where by the force of the current of a stream a field with crops standing on it is detached from the main land, there the rights of the original owner remain unaffected by the change ; on this the *Vīramitrodaya* observes that the exception only applies to the standing crops and after they are reaped the rule of accretion holds good ; where, however, there is no question of accretion and the river after having inundated the lands on its bank again recedes, there, Nārada says, the former ownership continues over its old site, its position being determined, in the absence of old land marks, by inference based upon other evidence. It will be observed that these rules clearly recognise the acquisition of land by right of contiguous accretion, and nothing depends so far as this right is concerned, on the gradual or sudden nature of the change, which, according to the English Law and the rules introduced in India by Regulation XI of 1825 seems to furnish the guiding principle on this question. An accession to one's land by the recession of the river was treated as if it were a gift made by the river due to the good luck of the riparian owner, and it made no difference whether it came all on a

sudden or gradually by slow and imperceptible advance. The Roman Law also does not seem to have recognised this distinction, and a careful comparison will show that the rules laid down in that system upon this subject have many points of resemblance to those indicated above.

Dealing with the question of accession one is reminded of the question also discussed in the Roman Law of the extent of the right of a person building a house upon the land of another with his own materials. On this, Nārada lays down that a person who pays rent to the owner of the land and lives there by building a house upon it, may, when he is required to leave the land, take away the materials with which he built the house ; where, however, no rent was paid, and there was no special contract about the removal of the materials, there the builder of the house being evicted from the land cannot take the materials away with him, and must leave them behind for the owner of the land. These rules are, on the whole, fair and reasonable, for the only case where the builder of the house loses the materials is where he did not pay for the occupation of the land and erected the house without the consent of the owner of the land and without entering into any previous understanding with him regarding the future disposal of the house or its materials ; in such a case it may well be presumed that the builder knowingly accepted the risk of losing the house and its materials on his eviction from the land ; at any rate these provisions are less severe than those of the English Law which by a somewhat stringent application of themaxim '*quicquid plantatur solo solo cedit*' allow the landowner to sweep off everything that is attached to his land.

Here I propose to conclude the present lecture. Among other sources of acquisition of ownership, *karmayoga* or employment of work does not require any special treatment, the receipt of remuneration for work done being generally the result of a sort of contractual obligation to which I will devote one of my future lectures. The next three lectures will be devoted to the law bearing upon some of the most important sources of what I my call derivative acquisition of ownership, *viz.*, the law of transfer, the law of prescription, and the law of succession.

LECTURE III

TRANSFER OF OWNERSHIP

Difference between gift and sale—Gift: its definition—Essentials of a valid gift—Formalities—Can ownership arise without acceptance of gift ?—Jīmūtavāhana's view—Mitākṣarā view—Objection against Dāyabhāga view—Three kinds of acceptance—Can a gift become complete without corporeal acceptance ?—Mayne's observations—Mitākṣarā view explained—Roman Law compared—Other formalities : Consent of co-villagers and neighbours—Markby's observations—Gift of gold and water: its significance. Mitākṣarā explanation—Sale assimilated to gift: its parallel in the Roman Mancipation—Difference set forth above indicates different lines of progress towards free alienation—Donee must be a sentient being in existence—Apparent exceptions referrable to a fiction of law—An extreme application of the rule—Other conditions of a valid gift—*Deya :* Things fit to be given—*Adeya :* Things not fit to be given—*Datta :* Irrevocable gifts—*Adatta :* Void gifts—Is a voluntary promise of gift enforceable ?—Validity of a gift to one after promise to another—Principles common to sale and gift—Effect of purchase from a person who is not the real owner—Purchase in the market overt and in the presence of king's officers—Purchaser when liable to punishment—Owners duty to bring a thief to the notice of the King—Rescission of sale—Conditions of rescission—Time of completion of sale : non-delivery of articles sold—Compensation for non-delivery—Liability for deterioration or loss after demand—Vīramitrodaya—Smṛticandrikā—Hindu and Roman Law compared—Effect of payment of earnest money—Priority in cases of gift and sale.

IN THIS LECTURE I propose to deal with the law of transfer of ownership by a voluntary act on the part of the owner. Prescription, which also effects a transfer of ownership, but is based not upon an act but upon an omission of the owner, will be discussed in the next lecture ; and Succession, which does not depend upon any voluntary act or omission on the part of the previous owner, will be treated in the lecture after that.

In dealing with voluntary transfer of ownership, we come across two distinct types of it, viz., sale and gift, and then

typify all acts of translation of ownership by the act of the owner with or without consideration. Where the owner parts with his ownership for a consideration, *i.e.*, in exchange for some substantial benefit conferred or promised to be conferred, the act amounts to an act of sale; where, however, there is no such consideration, the act of the owner in parting with his property is an act of gift. A little consideration will show that these two transactions (*i.e.*, gift and sale) have a common basis: in both, the transfer is a voluntary one and proceeds from an act of the previous owner intended to effectuate a translation of ownership from him to somebody else, and hence it is but natural that many of the principles which govern them must be common to them both. I shall therefore begin with the simpler of the two transactions, *viz.*, an act of gift, and discuss the principles bearing upon it, and I shall then supplement the discussion by dealing with those peculiar incidents of an act of sale which require separate consideration.

Gift—Gift[1] may be defined as the renunciation of property in favour of a sentient being having the result of extinguishing the ownership of the donor and creating ownership in the donee. (*Sva-svatva-dhvaṁsa-pūrvaka-parasvatvāpatti-phalaka-cetanoddeśapūrvaka-tyāgo dānam*). If we analyse this definition, it will be found that it is required that there must be a donor, a donee, a proper object of gift and a transaction involing certain formalities. Let us now consider what, according to Hindu Law, are the essentials of a valid gift.

Nature of the transaction and its attendant formalities.—I have stated that a gift involves a renunciation of property on the part of the donor in favour of another person. But is mere renunciation on the part of the donor sufficient to invest the person, in whose favour the renunciation is made, with ownership of the property given without a corresponding act on his part accepting the gift, or, to put it shortly, is ownership transferred to the donee without acceptance? The question is not free from difficulty, as it has formed the subject of a well-known controversy between the *Dāyabhāga* and the

1. For discussion on the nature of Gift, vide Kane, *History of Dharmaśāstra*, II-1, p. 841 and Vol. III, p. 471ff.

Mitākṣarā schools. Jīmūtavāhana maintains that property is not created by acceptance on the part of the donee, but by gift on the part of the donor, and he argues that if it had been otherwise, then, since the root *dā* signifies the extinction of ownership in one and creation of ownership in another, the acceptor would have been called the donor ; it is true that the Sanskrit word for acceptance is *svīkāra*, which signifies the reduction into one's property of a thing which was not so before, but it implies no more than this that though property had already arisen from the act of gift, still it is now by the act of the donee subsequently recognising it for his own, rendered liable to free disposal. The argument, which I have tried to summarise above, is based upon the peculiarities of Sanskrit Grammar, and I cannot hope to be able to make it clear to those of you who are not sufficiently acquianted with the niceties of that language ; moreover, it does not seem to me to be at all conclusive, for, as *Vīramitrodaya* has shown, it is not at all impossible to explain the gramatical construction of the word *dātā* which means a donor, without accepting the proposition that transmutation of ownership takes place even before the acceptance of the gift. The real bone of contention seems to be this : the donor being the owner of the property, it ought to be taken that he has got the right to divest himself of that ownership without the concurrence of anybody else ; but can he at the same time invest the donee with ownership without his concurrence ? Now, in cases where gift and acceptance take place simultaneously, the problem suggested above creates no practical difficulty, for the two acts being concurrent and simultaneous, it makes no practical difference whether you say that it is the acceptance which following upon the gift causes the transmutation of ownership or that it is the gift which transfers the ownership from the donor to the donee ; but the acceptance following upon it takes the ownership up, so to say, and makes it subject to determinate enjoyment. Where, however, there is a clear interval between the gift by the donor and the acceptance or non-acceptance of it by the donee, as the case may be, the question assumes practical importance, and requires

definite solution. Now, according to Jīmūtavāhana, ownership is transferred to the donee by the very act of the donor, but it is liable to be defeated by the refusal of the donee to accept the gift, or to be perfected by his acceptance thereof, so that in the interval between the gift and its acceptance or non-acceptance, as the case may be, the donee is vested with an incohate ownership which is either perfected or defeated on the donee either accepting or refusing to accept the gift. Vijñaneśvara and his followers, however, are of opinion, that although the donor may, by his act, divest himself of ownership over a particular property, he cannot, at his option, invest another person with ownership without the consent of the latter, so that in the interval between the gift and its acceptance or non-acceptance the object of gift does not become the property of the donee. The principal objection against the former view is that at the time when the gift is made, it cannot be pronounced for certain whether the donee will or will not accept the gift, so that the completion of the transfer of ownership hinges upon an uncertain contingency at that time, and if that be so, why should you say that the gift alone is sufficient to cause a transmutation of the ownership from the donor to the donee? Does not your own position involve that the gift is not the sole cause of the transfer but *svīkarā-prāgabhāva* (or antecedent absence of acceptance, which implies subsequent acceptance), to use the language of the Naiyāyikas, is also an auxiliary cause? And if you accept this, is it not better to avoid this sort of circuitious exposition and admit that the donee is not invested with ownership until he accepts the gift? The real difficulty of the later view seems, however, to be this :—the donor can, by the act of gift, divest himself of the ownership over the property given; if by that act the donee is not invested with ownership, in whom does the ownership inhere during the the interval between the gift and its acceptance or non-acceptance by the donee? Does it become a *res nullius*, so as to become liable to be appropriated by any person who may choose to take possession of it? To this *Vīramitrodaya* replies, that this difficulty does not really arise, for although the donor

may loose his ownership in so far as it involves the right of free disposal, he does not lose his right of custody (*paripālanīyatvarūpasvatva*) which prevents any one besides the donee from taking possession of it ; otherwise, by assuming that the donee becomes the owner although he may know nothing about the gift, you are forced to admit, in case of his ultimate refusal to accept, that the ownership did arise only to be extinguished upon this refusal, an admission which would involve the fault of complexity of assumptions (*gaurava*). I need not, however, attempt to decide upon the relative merits of these two views ; it is enough for my purpose that I have given you an idea of the difference that exists between the *Dāyabhāga* and the *Mitākṣarā* Schools upon this question, and I hope, I have also incidentally shown what amount of logical subtlety these Hindu Jurists brought to bear upon discussions of this kind.

Acceptance, as *Mitākṣarā* points out, may be of three kinds, mental, verbal and corporeal : mental acceptance consists of a determination of the mind regarding the property as one's own ; verbal acceptance is that mental state which finds expression in such words as 'this is mine' or the like, intimating the acceptance of the gift ; corporeal acceptance is constituted by the assumption of possession or some sort of corporeal control over the object of gift denoting the mental acceptance of the gift.[2] In the case of movable property, the three kinds of acceptance explained above may take place at once, but in the case of immovable property there can be no corporeal acceptance without some enjoyment of the produce, which cannot often take place all at once ; hence the question may arise wheather a gift can become complete without corporeal acceptance, or in other words, without assumption of possession, which, in the case of land, involves at least some little enjoyment of its produce. Dealing with this question Mr. Mayne observes that 'few propositions have been laid down with more confidence than the doctrine

2. Svīkāraś ca trividhaḥ, mānaso, vāciikaḥ, kāyikaś ceti. Tatra mānaso mamedam iti saṁkalparūpaḥ, vācikas tu mamedam ityādyabhivyāhārollekhī savikalpakaḥ pratyayaḥ, kāyikaḥ punar upādānābhimarśanādirūpo'nekavidhaḥ. Vijñāneśvara's commentary on *Yāj.* II.27.

that under Hindu Law a gift is invalid without prossession. 'Yet' he correctly points out, 'Hindu Law, properly so called, appears to lay little stress on any such as specially applicable to gifts.' He then extracts a passage from *Mitākṣarā* to show what its position really is, and I think I may also quote that passage here in order to enable you to see wheather the position that gift is invalid without possession is itself valid. After remarking that acceptance may be of three kinds, and explaining them in the way already stated by me, the author of *Mitākṣarā* goes on to observe that 'in the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession ; otherwise say's he, 'the gift, sale or other transfer is not complete.[3] A title, therefore, without corporeal acceptance consisting of the enjoyment of the produce, is weaker than a title accompanied by it or with such corporeal acceptance. But such is the case only where, of these two, the priority is undistinguishable ; but when it is ascertained which is first in point of date, and which is posterior, then the simple prior title affords the stronger evidence. Or the interpretation may be as follows :

'Evidence is said to consist of documents, possession and witnesses.'[4] This having been premised as the general rule, the texts 'a title is more powerful than possession unaccompanied by hereditary succession' and 'where there is not the least possession, there a title is not sufficient', have been propounded to point out to which the superiority belongs, where the three descriptions of evidence meet.' The above extract makes it quite clear that in the opinion of Vijñāneśvara delivery of possession was not absolutely essential to constitute a valid gift, but it is necessary to remember that a gift unaccompanied by possession is of a very risky kind, because, in a case of conflict between two apparent titles, in the absence of any evidence to the contrary, that which is accompanied by possession must prevail.

3. Kṣetrādau punaḥ phalopabhogavyatirekena kāyikasvīkārāsambhavāt svalpenāpy upabhogena bhavitavyam anyathā dānakrayādeḥ sampurṇatā na bhavati. on *Yāj*. II.27.

4. Pramāṇaṁ likhitaṁ bhuktiḥ sākṣiṇaś ceti kīrtitam. *Yāj*. II.22.

It seems to me that the position indicated above with regard to the relation between transfer of ownership and delivery of possession is eminently logical and reasonable ; the transfer of ownership is the result of the manifestation of intention on the part of the transferor to part with the ownership *in presenti* in favour of another who thereupon accepts the situation, agrees to become the owner, and does, by the combined effect of renunciation (*tyāga*) on the one hand and appropriation (*svīkāra*) on the other, become the owner. Assumption of possession and enjoyment of usufruct are not factors essentially requisite to complete the transfer of ownership, but they are acts indicative of an existing ownership which they seem to presuppose. It is true that a transfer of ownership unless coupled with or followed by a transfer of possession is a very risky affair ; in the first place, the transfer of ownership in such a case is often very difficult to prove ; in the second place this state of things, if it continues for some time, may very naturally give rise to a presumption that the person who has not got possession must have parted with any title that he might have acquired, and in the third place, in a case of conflicting claims, in the absence of any other test, the title which is coupled with possession must prevail; yet it can not be doubted that dellvery of possession need not be a necessary condition to the transfer of ownership which can be accomplished even without it by the coordinated desire of the transferor and the transferee; and a system of law which perceived the real relation between the two things, and viewed them in their true light must be admitted to have advanced very far in the development of juristic ideas.

It may be mentioned in this connection that according to the Roman Law property could not be transferred by mere agreement unless it was accompanied by delivery of possession; '*Traditionibus et usucapionibus, non mudis practis dominia tranferentus.*' (Codex Just. IV 3, 20). According to Mahomedan Law too, there can be no gift without delivery of seisin, and it is difficult, as Sir. W. Markby observes, to say when the idea of transferring ownership without transferring possession became familiar in modern law. 'To some minds', says

he, 'it can scarcely be said to be familiar still.' Thus he points out that 'Heineccius solemnly declared it to be a universal maxim of law that there can be no acquisition of ownership without tradition, and, an English lawyer, Mr. Serjeant Manning, had made a similar assertion'; it is therefore highly interesting to notice that more than a thousand years ago our Hindu Jurists correctly grasped the true relation between alienation and transfer of possession which has escaped the analysis of even some of the modern European lawyers; the inability to conceive transfer of ownership without delivery of possession betrays an imperfect power of abstraction from which the subtle minds of the Hindu Jurists were entirely free.

I shall now turn to the other formalities of a transfer prescribed by the Hindu Law. It does not appear that with regard to the transfer of movable property, any particular formality was required beyond what has been already mentioned; but with regard to land the *Mitākṣarā* quotes an anonymous text which lays down that 'land passes by six formalities; by consent of co-villagers, of kinsmen, of neighbours and of heirs, and by gift of gold and water'; in explaining this text the *Mitākṣarā* says that the consent of the co-villagers is required for the publicity of the transaction, since it is provided that 'acceptance of a gift, especially of land, should be public; but the transaction is not invalid without their consent and the approbation of neighbours (residing near the boundary) serves to obviate any dispute concerning the boundary'; as regards the other formalities, I shall explain their purpose according to the *Mitākṣarā* after I have done with these.

Turning, then, to the consent of the co-villagers and of the the neighbours, I may observe that the grounds on which their requirement is explained by the *Mitākṣarā* cannot be said to be far-fetched or unreasonable; it is but natural that one should desire that the transfer of the most important property which one could possess should be attended by certainty and notoriety, and for that purpose nothing could be better than to require that at the time of the transfer the consent of the

co-villagers and of the neighbouring land-holders should be obtained so as to give publicity to the transaction, as well as to obviate the chance of a future dispute. Mr. Mayne, however, suggests that these requirements might probably be the relics of a still older system in which 'the rights of a family in their property were limited by the rights of others outside the family'. It is not at all easy to speculate upon a subject like this with any amount of confidence, but if we consider the formalities of a '*mancipatio*' under the Roman Law which was the mode of conveyance by which *Res Mancipi* including land and some other commodities very highly valued by the early Romans were transferred before Justinian allowed its place to be taken by tradition or delivery of possession, and compare them with the requirements of Hindu Law as noticedabove, we may trace a of certain amount of resemblance between the two systems which may not be altogether accidental. Referring to the requirement of five witnesses besides the actual parties in a Roman Mancipation, Sir Willam Markby observes that the number is, he thinks, 'not to be referred to the imperfection of oral testimony, but to the requirement that the transfer should take place in the presence of and be consented to by the community at large, whom these five persons may be taken to represent' ; it can not be said that a silimar interpretation cannot be placed upon the original requirement of the consent of the co-villagers and the neighbouring landowners as laid down in the text cited above ; but however that may be, it is quite clear that that interpretation had long been forgotten in the days of the *Mitākṣarā*, and the explanations which that book furnishes are those which suggest themselves to one who lives in a progressive society which has outlived the stage of communal ownership.

Turning next to the requirement of the consent of Kinsmen and heirs, it will be observed that kinship and heirship may or may not involve co-ownership ; where the heirs and kinsmen are not co-owners, their consent, says the *Mitākṣarā*, is required for the facility of the transaction by obviating the possibility of any future dispute about the character of the property and the nature of the right of the transferor ; in such a case

the transferor has full power of alienation and the transaction is consequently valid even without the consent of those kinsmen; Aparārka goes further and says that the object of requiring the consent of such kinsmen is to indicate that where they are not unfit or indifferent, an alienation of immovable property should be made in their favour and not in favour of strangers.[5] Where, however, the heirs and kinsmen whose consent is desiderated are co-owners, the effect of the absence of that consent will depend upon the nature of the co-ownership which, as it is well-known, is differently conceived by the *Mitākṣarā* and the *Dāyabhāga* Schools of Hindu Law. As I propose to discuss the subject more fully in a future lecture, I refrain from dwelling upon it at this place beyond pointing out that the conception of joint ownership of the members of an undivided family under the *Mitākṣarā* School is fundamentally different from that under the *Dāyabhāga* School, and the result is that while an alienation of the joint property or any portion thereof by a *Mitākṣarā* co-parcener without the consent of the other co-parceners is generally regarded as invalid, a similar alienation by a *Dāyabhāga* co-parcener is regarded as valid and operates to the extent of the share which belongs to that individual according to the *Dāyabhāga* conception of joint ownership.

The next formality that requires consideration is the gift of gold and water accompanying an act of alienation of immovable property. One would have wondered what it meant, were it not for the explanation furnished by the *Mitākṣarā* which runs as follows: "Since the sale of immovables is forbidden ('In regard to the immovable estate, sale is not allowed; it may be mortgaged by consent of parties interested'); and since donation is praised ('Both he who accepts land and he who gives it are performers of a holy deed and shall go to a region of bliss'); if a sale must be made, it should be conducted for the transfer of immovable property in the form of a gift, delivering with it gold and water (to ratify the

5. Dānādiyogyeṣu vibhakteṣu dāyādeṣu sastu tebhya eva sthāvaram arpaṇīyam ayogyeṣu nirapekṣeṣu vā'nyebhyaḥ iti.
Aparārka's commentary on *the Y.S*, Section on *Dattāpradānika*.

donation)". It may here be interesting to pause for a moment and consider the special significance of the explanation given above, for it illustrates the tenacity with which old formalities cling to their existence even after the ground of their origin has ceased to exist. Under the early Hindu Law it seems that a sale of immovable property was not allowed to be made, but a gift of it for spiritual benefit of the donor was not similarly restrained, but was on the other hand commended as a meritorious act : hence when under the growing exigencies of the community a sale of land came to be tolerated, it was not yet looked upon as altogether free from stain ; and was made to resemble in its form an act of free gift ; this purpose was served by the accompaniment of gift of gold and water, by the vendor which symbolised, as it were, the ratification of a gift. Gradually, however, it has fallen into disuse, and nobody would have known anything about it but for the passage in the *Mitākṣarā* to which I have referred above.

This assimilation of a sale to an act of gift has got its parallel in the Roman *Mancipation*, but there it was not a sale that was assimilated to a gift, but a gift was made to resemble an act of sale. The formalities of mancipation are thus described by Gaius : "Mancipation is effected in the presence of not less than five witnesses who must be Roman citizens of the age of puberty, and also in the presence of another person of the same condition, who holds a pair of scales, and hence is called *libripens*. The purchaser taking hold of the thing says and affirms 'this thing is mine, *ex jure Quiritium*, and it is purchased by me with this piece of copper and these scales'. He then strikes the scale with the piece of money, and gives it to the seller as a symbol of the price". It will be remembered that under the early Roman Law, till the modification introduced by Justinian *Res Mancipi* including *Solum Italicum* could only be transferred by the formalities of a mancipation. What, then, do these formalities signify ? I have already indicated the original purpose which the presence of the five witnesses was perhaps designed to fulfil ; but what was the significance of the presence of that peculiar personage, the Libripens, with his pair of scales, and

what did the ceremony of striking the scales with a copper coin symbolise? It seems pretty clear that the ceremonies described above closely simulated an actual sale with the accompaniment of payment of price: the Libripens was there with his pair of scales to weigh, as it were, the coins payable as price, and the striking of the scale with a piece of money was emblematic of their payment; the question is, why, when no sale was actually in contemplation, as in the case of a gift or of that particular form of testamentary devise which was known as the testament *per aes et libram*, did the ceremonies simulate those of an actual sale including the payment of price? The explanation seems to be this: free alienation of immovable property was not favoured by any system of ancient law, but in course of time the old restraints on alienation were gradually relaxed in order to meet the demands of a progressive community undergoing social and economic modifications; it however so happened that the course pursued by one community in gradually removing the old impediments to alienation did not always agree with that followed by another, although both were ultimately moving towards one and the same destination. I have already explained that under the Hindu Law the first move was made in favour of an act of gift, which being regarded as a pious act was excepted from the general restraint on alienation of immovable property, and gradually, when a sale for price came to be tolerated, it appeared, as far as possible, under the garb of a gift; under the Roman Law, however, the course of transition seems to have been different; there the first exception seems to have been made in favour of a sale for valuable consideration, and when gradually other kinds of alienation began to be introduced, they simulated in outward appearance a sale for price, and that appearance was kept up, even when its original significance had been forgotten, by the presence of the libripens with his pair of scales and the striking of the scales with a piece of copper which served to symbolise the payment of price although no payment was actually intended. The difference above set forth, therefore, indicates different lines of progress towards free alienation; among the Hindus the first step

was taken in favour of pious gifts ; among the Romans sales for price furnished the first exceptions ; and when gradually the old trammels came to be further relaxed, among the Hindus a sale was assimilated to an act of gift, while among the Romans gift was made to resemble an act of sale. It will be unprofitable to speculate why the course of transition towards free alienation took different directions in the two communities, but it may, I think, be truly observed that the line of transition in each case was in perfect harmony with the genius of the race. Be that as it may, I shall not be wrong if I say that whatever the original significance of these formalities might have been they gradually came to be regarded as non-essential, and their prescription was explained in the way indicated above, as being intended either to give greater publicity to the transaction, or to ensure security from future dispute, or to lay down merely moral injunctions not touching the validity of the transaction ; in short they were treated as directory and not as mandatory ; and provided the donor was the owner of the thing, had the necessary capacity to make a gift of it, and acted freely, the non-observance of any of these formalities would not in any way invalidate the transfer on the principle succinctly set forth in Jīmūtavāhana's dictum that 'a fact cannot be altered by a hundred texts'[6], a principle which must not be taken to be a peculiar doctrine of the Bengal School, but is a doctrine equally recognised by all the schools of Hindu Law.

I have so long considered how far the validity of a gift depends upon the nature of the transaction including its attendant ceremonies ; I now propose to pass under review the other factors of a valid gift. A complete gift implies the existence of two parties, *viz*, a donor and a donee ; the donor gives the property and the donee accepts the gift and it is the conjunction of gift and acceptance that completes the transfer of ownership from one to the other. Hence it has been said that in order that there may be a valid gift the donee must be a sentient being in existence at the time of the gift. This

6. Vacanaśatenāpi vastuno'nyathākaraṇākteḥ. *Dāyabhāga*, II. 30. p. 35. (Edn. Jivānanda).

rule has not been laid down in so many words by any Hindu Law-giver, but it is a deduction from the definition of a gift which I have given above, as well as from the fact that no gift can be complete without acceptance. You will remember that I have defined a gift as the renunciation of property in favour of a sentient being having the result of extinguishing the ownership of the donor and creating ownership in the donee ; this necessarily implies that there must be a sentient being whom the donor intends to benefit by his gift and in whom the ownership becomes vested upon the extinction of the ownership of the donor by his own renunciation ; moreover, the completion of the transfer of title depends upon the acceptance of the gift by the donee, and this cannot possibly take place unless he be a sentient being in existence ; therefore the gift must be made in favour of a being who has got the capacity to accept, and in as much as such a capacity can only be attributed to a sentient being in existence, it follows that the donee must be a sentient being in existence at the time of the gift ; the rule was authoritatively laid down by the Judicial Committee of the Privy Council in the celebrated case of Tagore *vs* Tagore (9 B. L. R. 399 ; s. c. 18 W. R. 359) and has ever since been scrupulously followed. It should be noted that the rule insists on the existence of the donee as a sentient being capable of accepting the gift at the time of the gift, and not at any future time ; for instance it is not open to me to make a gift of my property in favour of the son who may be born to A in future, so as to enable the son so born to take the property under the gift at the time when he comes into existence ; it will be easy to understand this if we remember that a gift operates *in præsenti* to divest the owner of his ownership and to invest the donee with the same, which cannot take place unless the donee is already in existence ; for, to suppose that the donor has lost his ownership while no one else has been invested with it will be to reduce the object of gift to the condition of a *res nullius* which way be appropriated by anyone at his pleasure ; in fact to speak of a gift in favour of a person who at the moment does not exist and therefore in future may or may not exist involves a contradiction in

terms, and a gift in favour of a person who may come into existence in future can amount to nothing more than a promise to make a gift when the occassion will arise in future by that person really coming to exist ; a gift it must be understood, is a complete conveyance and not a mere promise to convey, and that being so, the requirement that the donee must be a sentient being in existence at the date of the gift is but a logical deduction from the very nature of the transaction. There is very little trace of the existence of testamentary power under the Hindu Law, save and except the rule laid down by Kātyāyana that in certain cases a promise to give made by a father which he has not been able to carry out during his life time must be fulfilled by his son after his death ; but when gifts by will gradually came into use, it was but natural to apply to them the analogies of a law of a gift *inter vivos*. 'The Law of Will' says the Privy Council, 'has grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts and it is the duty of a tribunal, dealing with a case new in the instance, to be governed by the established principles and the analogies which have heretofore prevailed in like case'. Hence applying the principle applicable to a gift *inter vivos* to the case of a testament, it has been held that no one can take under a will unless he be in existence at the death of the testator which is the time from which the will comes into operation. There are, however, two apparent exceptions to this rule, *viz.*, the cases of an infant child in its mother's womb and a son adopted after the death of the testator under an authority from him, but these are not real exceptions, since such persons are by a fiction of law considered to have been in existence at the death of the testator and are thus capable of taking from him. The exceptions, therefore, really prove the rule. It is, however, possible to carry the rule too far, and an extreme application of it is to be found in certain decisions of the Calcutta High Court* which have laid down that a gift to an idol, which is not in existence at the death of

* Upendra Lal Baral *v.* Hem Chandra Baral (1897) I.L.R. 25 Cal. 405 ; Rojomoyee Dasee *v.* Troilokho Mohini Dasee, (1901) I. L. R. 29 Cal. 260 ; Nagendra Nandini Dassi *v.* Binoy Krishna Deb (1902) I.L.R. 30 Cal. 521 ; Promothanath Roy *v.* Nagendrabala Chaudhurani (1908) 12 C.W.N. 808.

the testator but has been directed to be consecrated after his death is invalid, though the deity to be represented by the idol is always in existence. The ground of these decisions is that there could be no gift to the deity as such, and as regards the idol, it could not be the recepient of a gift before its consecration, so that in the absence of a duly consecrated idol at the time of the testators death the gift could not take effect and the property would vest in the person who could take it if there were no dedication at all. To this it may be replied that it is difficult to understand why it should be taken that there can be no dedication of property to the deity as such, for, in fact the dedication to an idol is really a dedication to the deity, the idol being no more than the visible image through which the deity is supposed specially to manifest itself by reason of the ceremonies of consecration; hence, when a person dedicates a property to an idol to be consecrated and established at a particular place, the dedication is really in favour of the ever-existent deity subject to the direction that its worship should be carried on at that place and through the image to be consecrated and established there; the establishment and consecration of the image does not bring into existence a new deity who did not formerly exist; but it merely gives, as it were, a local habitation to the deity in order to facilitate the worship of those who require the help of symbols to aid their devotion; it is therefore wrong to apply the analogy of a gift to an unborn person to the dedication of property to the deity coupled with the direction that the worship should be carried on by establishing an image of the deity at a particular place and consecrating the same; if any analogy were required, we might liken a dedication of this kind to the gift of property to an existing individual on condition that the gift should take effect when and so long as that

Note—Since these lectures were written a Full Bench of the Calcutta High Court has overruled these decisions and held that the rule which requires that for the validity of a gift, the relinquishment must be in favour of a sentient being does not apply to bequests to trustees for the establishment of an image and the worship of a Hindu the after deity testators death. See Bhupatinath Smrititirtha *v.* Ram Lal Maitra, (1909) 10 C. L. J. 355, S. C., 14 C. W. N.

individual resided at a particular place; in such a case it could not be said that the gift would be invalid because at the date of the gift the individual was not residing at that place, and the only result would be to postpone the enjoyment of the property until he began to reside there; similarly a dedication to the deity cannot fail on the ground that before the consecration of the image there was no recipient of the gift to validate the transaction, and all that can be said is that the intention of the testator cannot be effectuated and the object of the endowment cannot be fulfilled until the consecration of the image upon which the dedication takes a definite shape and the property becomes liable to regular disposal for the purpose of the endowment; just as it is the duty of the trustee to carry on the worship, so also it is his duty in a case like this to establish and consecrate the image for the purpose of worship, for the worship cannot commence according to the intention of the testator until the image has been consecrated and established, but in no way can the dedication fail on the ground that the donee was not in existence at the death of the testator. It is quite possible that cases may be found where the dedication clause is not very happily worded, but we must look to the substance of the thing with a view to give effect to the intention of the testator and not to defeat it by drawing metaphysical distinctions too subtle to grasp.

Having gone so far, I shall next proceed to consider the remaining conditions of a valid gift, and in doing so it will not perhaps be out of place to follow the Hindu Law-givers in the distinctions drawn by them between *deya* (what is fit to be given), *adeya* (what is unfit to be given), *datta* (what has been irrevocably given), and *adatta* (what, although given, is, in contemplation of law, not given).[7] Following these divisions, we find that a thing is regarded as fit to be given when it is the property of the donor, and there is no prohibition in the Śāstras to make a gift of it. Conversely, unfitness to be the object of a gift may arise from either want of title in the donor or existence of prohibition in the Śāstras. As examples

7. Adeyam atha deyaṁ ca dattaṁ cādattam eva ca/
Vyavahāreṣu vijñeyo dānamārgaś caturvidhaḥ// *N.S.* IV. 2.

of things which are not fit to be given by reason of want of title in the donor, mention is made of pledges, deposits and things borrowed or otherwise obtained on trust ; in these cases, the person in possession is not the owner of the thing, and a gift made by him will not only be infructuous, but will also render him liable to punishment. As regards sons and wives, they are also declared unfit to be given away by their fathers and husbands respectively,[8] but there is a difference of opinion as to whether this is so by reason of want of ownership in the father and the husband or on account of the Śāstric prohibition, which, in spite of ownership, condemns the gift as improper. I abstain from entering into the details of the controversy at this place, as I propose to deal with it in my lectures dealing with parental and marital relationships. Barring these, there are certain other instances in which a gift is prohibited although there can be no question of absence of ownership ; they are these : (1) gift of a thing which is the common property of the donor and other persons, (2) gift of property without keeping enough for the maintenance of the family, (3) gift of entire property when there are children to be provided for and (4) gift to one, of a thing which has been previously promised to another.

As regards things which do not belong exclusively to the donor, it is clear that although the donor has ownership in them, his ownership is not absolute, but is limited by the co-equal ownership of others ; hence he alone cannot have the right to give them away, and if he does, it cannot operate to the prejudice of the other owners. It may, however, be asked whether in such a case the donee may not step into the shoes of the donor and claim, not the entire property, which the donor had certainly no power to give, but a share which the donor might have claimed as his own ; the answer to this question will depend upon the conception of co-ownership in each case, and as there is a well-known diffe-

8. Anvāhitaṁ yācitakam ādhiṁ sādhāraṇaṁ ca yat/
Nikṣepaṁ putradāraṁ ca sarvasvaṁ cānvaye sati//
Āpatsv api hi kaṣṭāsu vartamānena dehinā/
Adeyāny aāhur ācāryā yac cānyasmai pratiśrutam// *N.S.* IV. 4-5.

rence about this matter between the *Dāyabhāga* and the *Mitākṣara* Schools, I reserve the point for a future lecture in which I shall try to explain the difference and deduce the necessary consequences therefrom.

As regards the rule that the extent of a person's gift should not be such as to deprive his family of the means of subsistence, it seems to be nothing more than a moral or religious injunction and the excess of the limit thus laid down cannot be a ground for holding the gift invalid. Jimūtavāhana expressly says so, and the opinion seems to be in consonance with the reason of the rule.

A similar interpretation should also be placed upon the prohibition of the gift of the entire property when there are sons to be provided for, unless we follow Aparārka in maintaining that the prohibition is meant to apply to cases where there are sons who compose an undivided family with their father and are thus co-owners with him.

Lastly, the direction that a thing which has been promised to one should not be given to another seems also to belong to the same class and not to affect the validity of a transaction.

On the whole, therefore, the conclusion at which we arrive is that it is only when a thing is declared unfit to be given by reason of want of title in the donor, that the gift, if made, does not pass any title, because the donor himself had none to convey. Where, however, the donor is the owner of the property, a gift of it will convey a valid title in spite of any prohibition that the Śāstras may have laid down. It is true that there are certain texts which lay down that both the giver and the acceptor of a thing declared unfit to be given render themselves liable to punishment, and some commentators argue therefrom that such a gift is liable to be revoked and the thing restored ; but having regard to the general principles of transfer of ownership, I think it will be going too far to say that although the owner makes a gift of his own property, no title will pass, simply because the Śāstras have condemned such a gift as improper. It is therefore important to distinguish between the two classes of objects unfit to be given, the unfitness being due either to want of title in

the donor or to a mere prohibition in the Śāstras; in the former case, the gift, if made will be invalid and infructuous; in the later case, the gift will be legally operative, but the act will be regarded as sinful and the parties to it will also render themselves liable to punishment from the king. Jagannātha seems to support this view, 'That a thing may not be given', says he, 'denotes that the gift is attended with sin, for this form of speech bears the sense of the imperative. It does not denote that the gift is a void act; were it so, it would not differ from a void donation; and full dominion would not be noticed under this title of 'what may not be given'. If it be said this title is intended to show punishment for such gifts it is answered, this from of prohibition implying offence, the offender should be punished. Thus the gift of things which are enumerated among those which may not be given is punishable; gifts enumerated among those which are void are utterly null'. The same conclusion will follow from the following considerations; acquisition of ownership, as has been explained in the last lecture, follows, according to the more widely recognised view, the popular usage; and gift and sale being among the means recognised by popular usage as causing a transfer of ownership, all that can be legitimately required from the legal standpoint to create a valid transfer are that the transferor should have full dominion over the property, that he should otherwise have full capacity to enter into a legal transaction, and that the transaction itself should be properly and legally performed; these conditions being fulfilled, the title will pass. notwithstanding any prohibition laid down in the Śāstras which can only operate upon the will of the transferor and the transferee by reason of the sanction attached to it in the form of punishment from the king, or at any rate, of misery in the life to come which is the inevitable result of the transgression of Śāstric injunctions; beyond this the force of the prohibition cannot go according to the well-known canon of construction tersely summed up by Jīmūtavāhana in the dictum 'a fact cannot be altered by a hundred texts'.

Having thus discussed what are and what are not fit to be given, let us now pass on to what the Hindu Law considers as

irrevocobly given. These are indicated in the following text of Nārada'[9]: 'they who know the law of gifts declare that things once delivered as the price of goods sold, as wages, for the pleasure (of hearing poets, musicians or the like), from natural affection, as a return for a benefaction, as a nuptial gift to a bride or her family, and through regard for religions merit, cannot be resumed'. It will be observed that in each of these cases there is some sort of consideration, whether valuable or not, to support the gift, and a gift once made under these circumstances cannot be revoked.

Last of all let us consider those gifts which are absolutely void and are treated as if they were not made. Nārada gives sixteen instances of void gifts: what has been given by men oppressed with fear, anger or intense grief; or as a bribe, or in jest, or by mistake, or through any fraudulent practice; what has been bestowed by a minor, an idiot, a person under duress, one whose mind is unsettled by disease, one intoxicated, or insane; what has been given in consideration that the donee will do some service in return (which, however, he has not performed); what has been given through ignorance to a bad man who pretended to be good, or for a righteous undertaking (where none was really contemplated); these (though given) are declared as not given'.[10] A consideration of these instances will show that the grounds on which the gifts fail are reducible to two main heads, (1) want of capacity of the donor, and (2) want of reality and freedom of the act of gift. Under the first head will come such temporary disabilities as minority, insanity, or want of freedom; under the second head we may consider the case where there is no real intention to make a gift, as when it is made in jest, and the cases where the gift is induced by coercion, fraud, mistake or misrepresentation. In

9. Paṇyamūlyaṁ bhṛtis tuṣṭyā snehāt pratyupakārtaḥ/
Strīśulkānugrahārthaṁ tu dattam dānavido viduḥ// *N.S.* IV. 8.

10. Adattaṁ tu bhayakrodhaśokavegaruganvitaiḥ/
Tathotkocaparīhāsavyatyāsacchalayogataḥ//
Bālamūḍhāsvatantrārtamattonmattāpavarjitam/
Kartā mamāyaṁ karmeti pratilābhecchayā ca yat//
Apātre pātram ity ukte kārye vā dharmasaṁyute/
Yad dattam syād avijñānād adattam iti tat smṛtam// *N.S.*IV. 9.11.

all these cases the law declares that there is no real gift, but only a semblence of gift ; and therefore the transaction is void of legal effect and the donor is entitled to revoke the gift and get the things given restored to him. The operation of the rules laid down above is not limited to the case of a gift, but they have a wider application ; thus Manu declares that 'a gift induced by force, possession taken by force, and document obtained by force, in short everything brought about by force should be regarded as null and void'[11] ; similarly, 'a pledge, a sale and a gift and acceptance induced by fraud, and wherever there is a condition which comes to light ; in all these cases the transaction is to be rescinded'[12]. The last portion of the above text as explained by *Mitākṣarā* lays down the law about contingent and conditional transfers ; it says that 'wherever a pledge, a sale or a gift and acceptance is made subject to a future condition as its adjunct, there, on the disappearance of that adjunct, the pledge, the sale, or the gift, as the case may be, shall be liable to be rescinded,[13] which means that where the operation of a transfer is made dependent upon the continued accompaniment of a certain condition, there the condition disappearing the operation of the transaction shall also cease to exist. For instance, if I give my property to you on condition of your supporting a certain religious institution, the gift will be rescinded on your ceasing to do so, inasmuch as the gift was not absolute, but subject to a condition as the auxiliary cause of its continued operation, which being goṇe, it could no longer continue to operate. I do not know how it may strike you, but it seems to me that these rules and the distinctions on which they are based exhibit a deep logical insight, a marked development of juristic ideas, and a high moral standard of which we, as the distant descendants of those who laid them down, may justly be proud.

11. Balād dattam balād bhūktam balād yad api lekhitam/
Sarvān balakṛtān arthān akṛtān manur abravīt// *M.S*, VIII. 168.

12. Yogādhamanavikrītaṁ yogadānapratigraham/
Yatra vāpy upadhim paśyet tat sarvaṁ vinivartayet//
M.S, VIII. 165.

13. Yenāgāminopādhiviśeṣeṇādhivikrayadānapratigrahāḥ kṛtās tad upādhivigame tān krayādīn vinivartayet. *Mitākṣarā* on *Y.S*, II. 176,

On the whole the conclusion seems to be that where the gift is made by a person without the ownership or without the requisite capacity to make a gift by reason of some disability whether of a temporary or of a more enduring character, or where the act of gift is not a real act, having been made in jest, or is not a free act by reason of its having been induced by coercion, fraud, misrepresentation or mistake, there the gift will be invalid and inoperative ; otherwise, a gift when made, will be valid and operative, although in certain cases a gift made in contravention of Śāstric prohibitions based on grounds other than those enumerated above will render the parties to the transaction liable to punishment from the king, apart from misery in the life to come which is the general sanction attached to Śāstric prohibitions.

I have stated that a gift made by a person suffering from disease is generally regarded as invalid on the ground that such a man is not in a proper frame of mind to weigh his act and come to a right decision about it ; this is, however, subject to an exception in favour of pious gifts, for Kātyāyana says 'what a man has given or promised for a religious purpose, whether in health or in sickness, must be given ; and if he has died without giving it, his son shall doubtless be compelled to deliver it'.[14] So we see that not only will a gift actually made for pious purposes be supported as valid, but even a promise made for such purposes will be enforced against the promisor, if he be living, and against his sons, if he be dead. The obligation thus cast upon the son to carry out the promise made by the father before his death has been supposed to contain the germ of a testamentary bequest and on the basis of such texts M. Gibelin has maintained that the Hindu will was of indigenous growth and not an European invention. However that may be, it is at any rate clear that the obligation so imposed upon the son was not regarded as a mere moral obligation, but as a legal obligation specifically enforceable by the king.

14. Svasthenārtena vā dattaṁ śrāvitam dharmakāraṇāt/
Adattvā tu mṛte dāpyas tatsuto nātra saṁśayaḥ// *Kātyāyana*, 654.
Dattam iti atra deyam ity Aparārkadhṛtapāṭhaḥ.

This brings us, by a natural transition to the question : How far is a voluntary promise enforceable against the promisor himself ? Mr. Mayne says that it is a general principle common to all systems of law that a voluntary promise cannot be enforced, though the voluntary act when completed is irrevocable ; it seems that this statement is not strictly accurate so far as the Hindu Law is concerned, for according to that system a promise made with a view to help the promisee in the performance of some religious or pious act which he has already begun is binding and enforceable as a debt due by the promisor. Thus Hārīta says 'whatever has been promised in words, but not performed in deed with a view to help the promisee in the performance of some meritorious act is a debt both in this world and in the next.[15] So also Kātyāyana says that 'whoever having voluntarily promised a gift to a Brāhmaṇa for religious merit afterwards refuses to give, shall be made to carry out his promise as if it were a debt, and shall also be liable to punishment.'[16] It is therefore clear that according to the Hindu Law, the promise of a gift, though voluntarily made, was enforceable as a debt when it was made either to a Brāhmaṇa for religious merit or with a view to help the performance of some meritorious act. Mr. Mayne says that 'it is quite certain that no promise to confer a future benefit upon a priest, however holy, would be enforced by the secular courts.' That may be so, but then the courts would not be administering the Hindu Law as it is, but merely giving effect to a doctrine of the English courts of Equity erroneously supposed to involve a principle common to all systems of law. It will be seen that the Hindu Law does not lay down that every voluntary promise of a gift is enforceable ; it is when the gift is voluntarily promised to a pious Brāhmaṇa who counts upon such gifts for his subsistence, or when it is promised in furtherance of a pious act in which the promisee is

15. Vācaiva yat pratijñātaṁ karmaṇā nopapāditam/
Ṛṇam tad dharmasamyuktam iha loke paratra ca//
In the above translation, I have followed the explanation given in the *Vīramitrodaya.*

16. Svecchayā yaḥ pratiśrutya brāhmaṇāya pratigraham/
Na dadyād ṛṇavad dāpyaḥ prāpnuyāt pūrvasāhasam//*Kātyāyana*, 642.

engaged, that the promise is declared enforceable by the court as if it were a debt incurred by the promisor ; and Gautama expressly enjoins that 'a gift, though promised, should not be made to an unrighteous man'.[17] It seems to me that understood in this limited sense, the rule of Hindu Law is not unreasonable or unjust ; on the other hand, to allow a man to create expectations without incurring any obligation to fulfil them can hardly be regarded as just and proper, especially when the person who is lured by such false hopes is a pious Brāhmaṇa, or a person engaged in the performance of some meritorious act, who would naturally adjust his expenses with reference to the assurance received. There can be no doubt that such a conduct would, everywhere, be regarded as morally reprehensible, and the Hindu Law only made the legal rule conform to the moral in recognising certain exceptions to the general rule that 'a voluntary promise can never be enforced'.

You will remember that I have already pointed out that according to the Hindu sages, a thing promised to one is not fit to be given to another ; you now see that in certain cases a voluntary promise may be legally enforced ; but you must not understand that a mere promise does, in any case, confer a title upon the promisee without an actual gift. Hence if a man gives to a person what he has promised another, the gift will not be invalid, and the thing cannot be recovered from the donee : although, under certain circumstances, the first promisee may pursue his remedy personally against his promisor and recover the equivalent of the gift from him on the principle already explained. This is not only clear on the general principle of transfer of ownership which I have already explained, but is also supported by the fact that even in those cases where a promise is declared to be binding, the obligation is likened to a debt, which indicates that the promisee has no title to the thing itself, but merely a personal right against the promisor.

I have so long dealt with the principles applicable to the case of a gift, and you will easily understand how most of

17. Pratiśrutyāpy adharmasamyuktāya na dadyāt. *G.D.S*, 1.5.21.

them are equally applicable to the case of a sale. Thus, in order that a sale may be valid, it is necessary that the vendor should have full dominion over the property sold, that he should have full legal capacity to enter into the transaction, and that the transaction itself should be real, and not brought about by fraud, or coercion, or the like. It is needless to reiterate these principles which have been fully explained in relation to a gift, and it is also needless to impress upon you that such prohibitions, as are to be found in the *Śāstras* but are not based upon any of the grounds indicated above, would generally be so interpreted as to make out that their violation would not affect the validity of the transaction. In these respects, the rules laid down, and the distinctions set forth in the case of a gift would *mutatis mutandis* hold good in the case of a sale. I shall now proceed to discuss some supplementary rules having special reference to the Law of Sale.

I have stated that a purchaser from a person who is not the owner cannot confer any title upon the purchaser although he might have *bonafide* belived that his vendor had a real title to pass. What then is to happen if the real owner comes forward and claims the thing? The procedure to be followed by a Court when a claim of this description comes before it for adjudication is thus explained by *Mitākṣarā* : The claimant must in the first instance establish his title to the thing and explain how it got out of his hands. On his succeeding to prove a subsisting title, the purchaser will be called upon to produce his vendor, and when the vendor appears, the contest will go on between him and the claimant ; thereupon if the claimant succeeds in establishing his claim, then will he recover the property, and the purchaser will get back his price from his vendor who will also render himself liable to punishment from the king ; in the converse case, the unsuccessful claimant will not only fail to get the property, but will himself be punished for bringing forward a false claim. If, however, the purchaser fails to produce his vendor, then he will not only lose the property, but shall also be required to prove the *bonafides* of his purchase in order to exculpate himself. This rule, however, is subject to certain exceptions ; for, as Kātyāyana

has laid down, if the purchaser proves that he purchased the property from market overt or to the knowledge of king's officers, or openly from a place where the vendor cannot be traced, or the vendor is dead, then the claimant, although he is the real owner, shall get back the property on payment of half its price to the purchaser.[18] These exceptions are justified on the ground that the owner loses half the price because somehow or other the property got out of his hands, and the purchaser loses half as he had the misfortune to purchase from one whom he cannot trace or produce before the court, although there could be no question about the *bonafides* of his purchase, so that both being equally blameless and equally unfortunate, it is but meet that the loss should be equally distributed between the two. On the other hand, where the purchaser fails to prove the *bonafides* of his purchase, for instance, where he purchased in secret, without publicity, from doubtful character, at an inadequate price, or at an improper time, there he shall be liable to punisnment as if he were a thief, the presumption being that he must have purchased with the knowledge that there was something wrong about it. I need not dilate upon this subject any further, as I believe I have stated enough to show that the rules of Hindu Law upon the subject are on the whole well-considered and reasonable. I should, however, add that it was considered to be the duty of the owner to bring a theft to the knowledge of the king, and if he remained satisfied on merely getting back the property without bringing the matter to the notice of the king, he would render himself liable to be punished with a fine,[19] a rule which is bassed upon the recognition of the interest of the community as something distinct from the interest of the individual which it is the duty of every individual to subserve.

18. Vaṇigvīthīparigataṁ vijñātaṁ rājapuruṣaiḥ/
Avijñātāśrayāt krītam vikretā yatra vā mṛtaḥ/
Svāmī dattvārdhamūlyam tu pragṛhṇīyāt svakam dhanam//
Kāt. 621-22.

19. Hṛtam pranaṣṭam yo dravyam parahastād avāpnuyāt/
Anivedya nṛpe daṇḍyaḥ sa tu ṣaṇṇavatipaṇān// *Y.S*, II.172.

The next topic that deserves a brief consideration is the rescission of sale. It often happens that after a purchase we begin to repent of the bargin either because the thing purchased proves to be worse than what we took it to be or because the price we paid appears to be too high ; the question is whether there ought not to be any remedy for it. On the one hand it may be said that one ought to take proper care before the transaction is completed and that once the bargain is struck there can no longer be any help for it ; on the other hand, it seems to be very hard that in no case should the purchaser be allowed to cancel the purchase and get out of the transaction which he had concluded under a misconception about its nature and advantages.

There can be no doubt that much may be said in support of the former view that a purchaser makes the purchase at his risk and should not be allowed to complain after the bargain is once concluded, but at the same time it must be observed that commercialism need not be the sole guiding principle of a community and an actual hardship should be relieved in so far as it can be done without unjustly entailing equal or greater injury to others. It is therefore highly interesting to find that the Hindu Law attempted to reconcile the interest of private purchasers with the interest of trade by laying down certain rules which without sacrificing the certainty of trade by allowing excessive and belated interference with concluded transactions provided some protection against being entrapped into and held fast by hasty and incosiderate bargains. The rules were these : in every case the purchaser, unless he had previously examined the thing purchased with a view to ascertain their quality and approved of them upon such examination, was entitled to a certain period to examine them, and if within that period it was found that the thing was defective he could return it to the vendor and recover the price from him. The period allowed for examination was viewed according to the nature of the object sold ; thus three days were allowed for the examination of a milch-cow, five days for the examination of a horse, and seven days for that of precious stones such as pearls, diamonds and the like. If

however, the purchaser had before the purchase examined the thing to be purchased, and approved of it, then he could not afterwards complain and have the sale rescinded on the ground that there was a defect which had escaped his examination.[20] You will observe that what has been stated above related to the rescission on the ground of discovery of defect after the completion of the purchase without previous examination, and the rule upon the subject does not seem to me to be at all unreasonable or unjust ; those of you who have any doubt upon it will I hope think otherwise, when you will have more frequent occasions to purchase things like those mentioned above. Apart, however, from any examination or discovery of defect, the Hindu Law allowed a further indulgence to the purchaser ; it granted him a period of grace within which to return the thing purchased, a sort of *locus penitentiæ*, so to say, if he repented of the bargain and desired to rescind the sale ; the period allowed was, however, very short, being the first day to get back the full purchase money, and the second and third days to recover.[21] It should also be mentioned that the right to return could not be availed of if the article sold had been soiled or otherwise injured by use, although it might appear to have been defective.[22] Considering, then, all these rules together subject to the limitations indicated above, it seems to me impossible to say that they do not deserve serious consideration, although I do not know of any other system of law in which similar rules have prevailed.

I shall now say a few words about the completion of sale and the effect of non-delivery of articles sold.[22a] A purchase

20. Kretā paṇyam parīkṣeta prāk svayaṁ guṇadoṣataḥ/
Parīkṣābhimataṁ krītam vikretur na bhavet punaḥ//*Nārada*, IX.4.

21. Krītvā mūlyena yaḥ paṇyaṁ duṣkrītaṁ manyate krayī/
Vikretuḥ pratideyam tat tasminn evāhny avikṣatam//
Dvitīye'hni dadat kretā mūlyāt triṁśāṁśaṁ āharet/
Dviguṇaṁ tu tṛtīye'hni parataḥ kretur eva tat// *Nārada*, IX.2-3.

22. Paribhuktaṁ tu yad vāsaḥ kṛṣṇarūpaṁ malīmasam/
Sadoṣam api tat krītam vikretur na bhavet punaḥ// *Nārada*, IX.7.

22a. Nārada defines the nature of that Vyavahārapada in the following way :

Vikrīya paṇyaṁ mūlyena kretre yan na pradīyate/
Vikrīyāsampradānaṁ tad vivādapadam ucyate// *Nārada*, VIII.1.

ordinarily becomes completed on the payment of the price, unless the payment is deferred by a special contract between the parties, the result, therefore, is that where the price has not been paid, the vendor is free to sell to another in the absence of a special contract to the contrary.[23] When the sale has been completed by the payment of the price, the seller is bound to deliver the article sold to the purchaser, and on refusal will be compelled to deliver together with proper compensation. Various rules have been laid down for measuring the compensation in each case, of which the following may be specially noticed ; if the price of the article has fallen down in the interval, then the seller shall be compelled to deliver the articles sold together with such compensation as will make up for the reduction in the price ; where, the price has remained constant, there nothing more than ordinary interest will be charged ; where, however, the price has gone up there the compensation will be measured by the profit which the seller has reaped after this improper refusal to deliver. These rules are to be understood to refer to the case of a purchaser belonging to the same locality as the vendor ; where the purchaser has came from a different country with a view to send the article there, in that case the price that prevails in that country must be taken into account in measuring the compensation.

As regards loss or deterioration of the articles sold while lying in the hands of the seller the law stands thus: If the seller did not deliver the article although the purchaser asked for their delivery, then any subsequent loss or deterioration, even if it arises from an act of king or an act of God over which the seller has no control, must fall upon him for the non-delivery was due to his default.[24] Conversely if the purchaser did not

Note also the following verse of Nārada for the meaning of the word 'Paṇya' :

Loke'smin dvividhaṁ dravyaṁ jaṅgamaṁ sthāvaraṁ tathā/
Krayavikrayadharmeṣu sarvaṁ tad paṇyam ueyata// Ibid., VIII.1.

23. Dattamūlyasya paṇyasya vidhir evaṁ prakīrtitaḥ/
Adatte 'nyatra samayān na vikretur atikramaḥ// *Nārada*, VIII.10.

24. Rājadaivopaghātena paṇye doṣam upāgate/
Hānir vikretur evāsau yācitasyāprayacchataḥ// *Y.S*, II.256.

take delivery although the seller expressed his readiness to deliver, then any loss arising from an act of king or an act of God must be suffered by the purchaser, for it was he who defaulted in taking the delivery.[25] Of course, if the loss arises from some willful act of the seller, this rule will not apply and he will be reponsible for the same. It may be mentioned that when a thing is burnt by fire or stolen by thieves the loss is generally regarded as one due to an act of God. So far the position is quite clear : The loss will fall upon the party owing to whose default the thing remained in the hands of the seller, except of course where the loss itself was caused by one of the parties to the transaction. A doubt, however, arises as to what should be the rule, when previous to the loss, there had been neither any demand for delivery on the part of the purchaser, nor any offer to deliver on the part of the seller. *Vīramitrodaya* says that the text of Yājñavalkya, referred to above, makes the seller responsible when he had failed to deliver the thing sold upon demand from the purchaser, which indicates that in the absence of such previous demand, the seller cannot be held responsible for any loss or deterioration arising from an act of king or an act of God, but it then proceeds to quote without any apparent disapproval the opinion of the author of *Smṛticandrikā* to the effect that where after the completion of purchase, neither the purchaser has asked for delivery nor the seller has offered to deliver the thing sold and it is lost or injured under those circumstances, there the loss will be equally divided between the seller and the puchaser in as much as owing to the negligence of the one to offer and of the other to demand delivery, there has been default on both the sides.[26]

It may be interesting to compare with these provisions some of the provisions of the Roman Law bearing upon similar questions. According to the Roman Law also, a sale

25. Dīyamānam na gṛhṇāti krītam paṇyaṁ ca yaḥ krayī/
Sa evāsya bhaved doṣo vikretur yo 'prayacchataḥ/ *Nārada*, VIII.9.

26. Krayānantaram kretrā na yācitaṁ vikretrā ca na samarpitam, jātaś caurādyupadravas tatra dvayoḥ samā hāniḥ, kretṛ-vikretror ubhayor api yācanārpaṇaśaithilyena sāparādhatvāt. *Smṛticandrikā*, II, 514.

does not become complete and the property does not pass from the seller to the buyer, until the buyer has paid the price to the seller, or satisfied him in some way or other, except where the seller has accepted the credit of the buyer in which case, the property becomes immediately the property of the buyer. You will find that so far, the Roman Law is in complete accord with the Hindu Law. The Roman Law, however, recognises a contract of sale, as distinguished from a completed sale and lays down that the contract is formed as soon as the price is agreed upon, although the title may not be transferred until the payment of the price ; as a corollary from this, it further lays down, that from the moment of the completion of the contract on the parties having agreed on the price, all the risks attaching to the thing contracted to be sold falls upon the purchaser, although the thing has not yet been delivered to him ; and similarly, he also becomes entitled to all the advantages which may accrue and be attached to that thing. Now, looking at these provisions as a whole, it does not seem to me that either in point of subtlety, or in point of reasonableness or logical consistency, the Hindu Law suffers from a comparision with Roman Law.

I have stated that according to Hindu Law, a mere verbal agreement does not, in the absence of a special contract, preclude the owner from dealing with some orher intending purchaser. It is, however, otherwise, where the verbal agreement has been followed by payment of earnest money ; for in that case, it has been laid down, that if the intending purchaser refuses to complete the purchase within proper time, he shall forfeit the earnest money ; while on the other hand, if the seller refuses to complete the sale he shall have to return not only the earnest money, but also to pay an equal sum as compensation.[27] Couriously enough, these provisions com-

27. Satyaṁkāraṁ ca yo dattvā yathākālaṁ na dṛśyate/
Paṇyaṁ bhaven nisṛṣṭaṁ tad dīyamānaṁ agṛhṇataḥ//
Vyāsa, quoted in the Sm.C. II, p. 220
Satyaṁkārakṛtaṁ dravyaṁ dviguṇaṁ pratidāpayet. *Y.S*, II.61.
Atra paṇyadravyasyotsargaḥ satyāṁkāradravyasyotsargo 'bhimataḥ.
Vīramitrodaya,
Vide here the commentry of Vijñāneśvara on Yāj, II.61.

pletely coincide with those of the Roman Law as modified by Justinian. It is stated in the Institutes of Justinian that 'if earnest money has been given, then, whether the contract was written or unwritten, the purchaser, if he refuses to fulfit it, loses what he has given as earnest, and the seller, if he refuses, has to restore double' and on this Mr. Sandars comments that 'the arrae were either signs of a bargain having been struck, or consisted of an advance of a portion of the purchase money. Justinian gave these deposits a new character by making them the measures of a forfeit in case either party wished to recede from this bargain, it being open to either party to retract if if he chose to incur the forfeit.'

It now remains to me to close this lecture by pointing out that both in cases of gift and sale, the prior in time prevails for it has been said that 'in all litigious disputes the subsequent act prevails, but in the case of pledge, acceptance (of a gift) and purchase, the prior act is more forcible'.[28] The reason of this is quite plain, for once a transfer has been made the transferor has lost his interest and is quite incompetent to interfere with the right of the transferee.*

28. Sarveṣv arthavivādeṣu balavaty uttarā kriyā/
Ādhau pratigrahe krite pūrvā tu balavattarā// *Yāj*, II.23.
For interpretation on the same vide the Mitākṣarā on this verse.

* For detailed discussion on the title of Law as Krayavikrayānuśaya (Manu, VIII.222, Kauṭilya's Arthaśāstra, III.15.), which Nārada splits into two titles as Vikrīyāsampradāna (VIII) and Krītyānuśaya (IX), vide P. V. Kane, History of Dharmaśāstra, III. 489ff.

LECTURE IV

THE LAW OF PRESCRIPTION

Prescription : adverse possession—Text of Yāñjavalkya—Elements of prescription—Controversy : *Mitākṣarā* view—Usufruct is lost but not title—*Kalpataru* ; *Ratnākara* ; *Smṛti*tattva and *Smṛticandrikā*—Extinctive prescription : title also is lost—Bhabadeva's view—Doctrine of presumption—Pradīpkāra's emendation—Criticism of the doctrine of extinctive prescription—Vācaspati's view—Aparārka's solution—*Vīramitrodaya* reconciles the text of Bṛhaspati and Yājñavalkya—Comments upon the contoversy—Similar controversy in European Jurisprudence. Sir Henry Maine —Influence of Canon Law—The speculative basis of prescription : a point of interest in France and Germany even now ;—not so in England.—The Hindu and Roman systems compared—Exceptions to the applicability of prescription their principle.—Similar exceptions in other systems—Possession as evidence of title—Yājñavalkya. Hereditory possession : what it means—Nārada—Vyāsa—Aparārka—*Mitākṣarā*—Conclusion—Similar doctrines in other systems—Savigny—Vattel—English Law—Littleton—Introduction of the presumption of legal origin—The first year of the reign of Richard I—Inconvenience of the rule—Presumption of a modern lost grant—Hindu and English Law compared.

IN THIS LECTURE, I propose to deal with the Hindu Law of Prescription, or the effect of long possession without any opposition from the true owner. The plain meaning of the text of Yājñavalkya bearing upon this question seems to be that 'he who sees his land being enjoyed by a stranger for twenty years, and his personal chattel for ten years without asserting his own right, loses them'.[1] You will observe that in order to have the effect mentioned by this text, the possession must have been held by the stranger to the knowledge of the owner, but without any protest or opposition from him ;

1. Paśyato 'bruvato bhūmer hānir viṁśativārṣikī/
   Pareṇa bhujyamānāyāḥ dhanasya daśavārṣikī// *Yāj.* II.24.

it is the concurrence of the presence of knowledge with the absence of opposition on the part of the owner that attaches to the adverse possession when it has continued for a certain length of time, the effect of extinguishing the right of the previous owner ; and either of these elements being wanting, the resulting consequence will not arise. It therefore, follows that, whatever the length of possession may be, it will be of no avail if the owner was not aware of it, or being aware, asserted his title, and opposed the possession of the stranger. You will also notice that the period required for ripening the prescription is longer in the case of immovable property than in the case of movables, being twenty years in the former case, and ten in the latter, a difference evidently due to the greater value and importance of land. These elements in the constitution of the rule being understood, the question arises, what is the effect ? One thing seems to be clear, *viz.*, that the effect spoken of is extinctive in its character as indicated by the word *hāni* which means loss or deprivation ; words used in the texts of other law-givers to which I may have occasion to refer are also of similar import ; we may therefore take it, that by adverse possession of the requisite character, the owner loses, or in other words, is deprived of something ; but the question is, what that something is. I may tell you at once that our jurists are not all agreed upon this point, and a remarkable controversy full of subtle distinctions, has clustered around it. I shall try to give you some idea of this controversy and of the different opinions that were maintained by the different jurists.

The author of *Mitākṣarā* seeks to place a very narrow construction upon the text cited above, and the effect of prescription, according to him is very limited in its character. He argues that omission to assert one's title cannot legitimately be regarded as a cause of the extinction of that title ; similarly mere enjoyment, whatever its duration may be, cannot be regarded as a source of title, since it is not recognised as such in popular usage, and a text of Nārada has declared that 'the king shall punish a person who enjoys another's property without any title as if he were a thief, although he may have

done so for hundred years'.[2] He therefore concludes that the loss (*hani*) spoken of in the text means not the loss of the property itself, but of the usufruct enjoyed by the person in adverse possession, so that the owner shall not be entitled, after the prescribed period, to recover the profits already appropriated by the person in possession whom he has allowed to do so with his eyes open and without any opposition ; but that the title to the property itself and the right to recover the same shall remain intact, since title cannot be lost by mere lapse of time in asserting it.[3]

On the other hand, the authors of Kalpataru, Ratnākara, Smṛtitattva and Smṛticaṇdrikā maintain that adverse possession for the prescribed period and fulfilling the required conditions does extinguish the title of the owner so kept out of possession, not only to the usufruct but also to the property itself. They argue that there is no sufficient ground to limit the scope of the text by putting an unnatural and strained meaning upon its words in the way indicated above ; when *Mitākṣarā* admits that after the prescribed period the usufruct is lost to the owner, it may be asked—why is it so lost ? To this question there are two possible answers, for it may either be said that the loss is the condign consequence of the owner's own fault in omitting to protest against the possession which was being enjoyed before his eyes or it may be advanced, that the text of the *Śāstra* being there, it is unnecessary to grope for any other basis than that furnished by the text itself ; now, as regards the former alternative, it may be observed that it does not sufficiently explain the rule, for, if the loss of

2. Anāgamaṁ tu yo bhuṅkte bahuny abdaśatāny api/
Cauradaṇḍena taṁ pāpaṁ daṇḍayet pṛthivīpatiḥ// *Nārada*, 1.87.

3. Bhūmer dhanasya ca phalahānir iha vivakṣitā, na vastuhānir nāpi vyavahārahāniḥ. Tathā hi nirākrośaṁ viṁśativarṣopabhogād ūrdhvaṁ yady api svāmī nyāyataḥ kṣetraṁ labhate, tathāpi phalanusaraṇaṁ na labhate apratiṣedalakṣaṅāt svāparādhād asmāc ca vacanāt. Parokṣabhoge tu viṁśater ūrdhvam api phalānusaraṇaṁ labhata eva, paśyataḥ iti vacanāt. Pratyakṣabhoge ca sākrośe, abruvataḥ iti vacanāt. Viṁśateḥ prāk pratyakṣe nirākrośe ca labhate, viṁśatigrahaṇāt...... Tasmāt svāmyupekṣālakṣaṇasvāparādhād asmāc ca vacanād viṁśater ūrdhvaṁ phalaṁ naṣṭaṁ na labhate iti sthitam. Vijñāneśvara's com. on *Yāj*. II.24.

the usufruct was the natural consequence of the owner's own default in omitting to oppose the possession of the stranger, what is the reason, for fixing upon twenty years or ten years to entitle that consequence ? Did not the fault due to the owner's own default exist even before the completion of the prescribed period, and, if so, how can the prescription be sufficiently explained from the reason of the rule without recourse to the authority of the text ? It being then conceded that ultimately there can be no escape from falling back upon the authority of the text, the question arises whether we should interpret the the text according to its obvious and natural import, or turn and twist it with a view to make it fit in with a preconceived idea that property can not be lost by mere non-enjoyment, whatever its duration may be. The authors mentioned above therefore maintain that an adverse possession of the nature described in the text already explained extinguished the title of the owner kept out of possession not only to the usufruct but also to the property itself.

Between these two extreme views there are certain intermediate positions which may now be briefly indicated and explained. Bhabadeva maintains that adverse possession for the prescribed period to the knowledge of and without any opposition from the owner has the effect of raising a presumption that the owner must have abandoned the property, which being taken up by the possessor, he acquires a title to it by a sort of appopriation (*parigraha*) of a thing which is for the time without an owner. His conclusion, therefore, practically coincides with the last mentioned view, but it is arrived at in a somewhat round-about way, for, according to his contention, the extinction of title of the previous owner is not the direct result of adverse possession for the prescribed period suffered by him without opposition, but is the result of abandonment which is presumed from that adverse possession ; the loss of title, therefore, is, according to this view, inferential, the inference being propped up by the presumption of abandonment which, as it arises from the text quoted above, must be taken to be irrebuttable in its character. Pradīpakāra also accepts this view, but with a little emendation ; he says that the

presumption arises from adverse possession extending over the prescribed period coupled with the impossibility of ascribing non-resistance to mere indifference or good naturedness of the owner, and the character of the presumption is that the owner has either transferred the thing to the person in possession or has abandoned it in his favour, it being unnecessary to select between the two. The real difficulties of this doctrine of irrebuttable presumption are why should the presumption at all arise, and at all events, why should it be irrebuttable? As *Vīramitrodaya* very pertinently points out, ten years or twenty years is not too long a time to be beyond all human recollection, and when nobody recollects any transfer in favour of the possessor, or any abandonment by the previous owner, the inference arises that no such thing took place, since otherwise, it would have been remembered ; hence the presumptions, on which reliance has been sought to be placed by Bhabadeva and the author of Pradīpa, do not really arise, and their doctrines cannot be seriously sustained[4]. If in order to escape from these difficulties, it becomes neccssary to say that the presumptions do arise, and they cannot be rebutted by reason of the text cited above, then is it not better to avoid the circumlocution, and say plainly that the loss of title rests solely on the authority of the text? The doctrine of presumption, therefore, seems to be either untenable or unnecessary, and it can only serve as a specimen of the ingenuity displayed by Hindu jurists, in drawing fine distinctions in order to arrive at a desired conclusion.

The real difficulty in the way of accepting the doctrine of extinctive or translative prescription arises from the view which seems to have been widely recognised that title cannot be extinguished by mere adverse possession without the consent or concurrence of the real owner ; hence Vijñāneśvara attempted to explain the text of Yājñavalkya by arguing that the loss (*hāni*) spoken of there referred to the loss of the

4. Smārtakāle smartavyāsmaraṇarūpatayā yogyānupalabdhyā bhoktur āgamābhāvaniścaye pūrvasvāminaś ca tyāgābhāvaniścaye tadīyaparigraha-kṛtasvatvotpatti-pūrvasvāmitvadhvaṁsāv ubhāv api kalpayitum aśakyāv iti matadvayam apīdam atyayuktam. *Vīramitrodaya*, *Vyavahāraprakāśa*, p. 163. It may be noted in this context that the discussion on *Bhukti* by Mitramiśra is most elaborate and scientific. Vide *Vyavahāraprakāśa*, pp. 152-167.

usufruct already enjoyed, but he does so, as I have already pointed out, by putting a somewhat strained interpretation upon the words of the text. Vācaspati endeavoured to dispose of the question in a somewhat different way; the text of Yājñavalkya and similar other texts, he contended, were designed to point out the risk of indifference in asserting one's title to a property which is being enjoyed by another, and hence to impress upon the owner the duty of preserving with care the evidence of his title by asserting it in proper time; this view reduces the rule of prescription to a rule of evidence, but the obvious objection to it is that it renders the prescription of definite periods (ten years and twenty years) superfluous, since it cannot be said that the risk is any the less before the completion of those periods.

Aparārka seeks to escape from these difficulties by maintaining that what has been laid down in the texts about the loss of property has been stated from the standpoint of positive law administered by the Courts, but it does not indicate the real direction which the property takes under those circumstances. This, he says, is supported by the text of Manu declaring that 'if a person, not being an idiot or a minor, allows his property to be enjoyed by another, then his title to it breaks down and person in enjoyment succeeds in litigation'[5]; hence all that can be said is that after the lapse of the prescribed period the Court will not help the owner in getting back the property from the person in possession, but his title is not lost; and if the person in possession, out of conscientious scruples or moral compunction, returns the property, title and possession again meet in the same individual, and the original condition is restored. It will appear that Aparārka thus reduces the rule into a rule of limitation of action, but he also has not consistently maintained the distinction between a rule of limitation which is meant for the guidance of the Court, and a rule of prescription which operates by extinguishing the title itself.

5. Ajaḍaś ced apaugaṇḍo viṣayaś cāsya bhujyate/
Bhagnaṁ tad vyavahāreṇa bhoktā tad dhanam arhati//
Manu, VIII.148.

Vide here the Bhāṣya of Medhātithi for interesting discussions.

There is a text of *Bṛhaspati* which lays down that 'when a person has been in possession continuously for thirty years without any interruption that possession will not be afterwards disturbed'.[6] *Vīramitrodaya* reconciles this with the text of Yājñavalkya by holding that the rule of twenty years applies where the owner has not asserted his title in opposition to the person in possession, but the thirty years' rule applies where in spite of verbal protest, the adverse possession has been continuously maintained.

On perusal of the discussions which have centred round this remarkable controversy, one cannot but be struck by the splendid development of juristic ideas which they evince; the arguments advanced display a clear conception of the problem, great logical acumen in drawing distinctions and dealing with them, and high moral standard which hesitates to invest the man in possession with ownership when that possession had its origin in wrong. Sir William Markby therefore betrays a very insufficient knowledge of the Hindu Law of Prescription when in a footnote in the chapter on Prescription in his *Elements of Law*, he somewhat superciliously observes—'Even in a system so title advanced as the ancient Hindu Law the advantages of a just title are recognised. The *Mitākṣarā* lawyers would allow a right to be gained in twenty years, but only if the party already held under a title which though defective was just'. It is apparent that Sir William Markby knew very little of the Hindu Law of Prescription, and that little not correctly, and yet we are sorry to observe that he could not introduce his casual observations without a fling upon the ancient Hindu Law. For this, however, we ourselves are partly responsible; since, when foreign jurists, in spite of their many disadvantages have out of a pure spirit of research directed their attention to these subjects, no matter with what success, we ourselves have simply looked on.

As regards the controversy itself, it seems to me that the texts themselves laid down not merely a rule of limitation or a rule of evidence, but a rule of extinction of title by operation

6. Adhyāsanāt samārabhya bhuktir yasyāvighātinī/
Triṁśadvarṣāṇyāṇya vicchinnā tasya tāṁ na vicālayet//
Bṛhaspati, VII.28.

of law. The text prescribing punishment for wrongful possession, although that possession may have continued for a very long time, is not really in conflict with the other texts laying down definite periods for extinction of title by prescription, for a man may be punishable for the original trespass even after a long lapse of time apart from any question regarding the civil rights of the parties and the civil remedies of the original owner. When, however, in course of time, the constructive period was followed by the critical period of Hindu Jurisprudence, and the philosophical jurists who took up the discussions began to enquire into the theoretical basis of prescription they were beset with doubts and difficulties and in the result, different jurists tried to solve them in different ways. The foundation of this difficulty is not far to seek, for, theoretically one might find it difficult to understand why an existing right should be destroyed by mere non-assertion of it for a certain length of time, or how possession, which was wrongful, could, by mere continuance, change its character and become rightful after a certain period. It is remarkable that a study of the modern European Jurisprudence discloses a similar controversy and a similar disinclination to regard title as capable of being totally lost through dispossession. Sir Henry Maine's remarks on this question are so instructive and interesting that I can not resist the temptation of quoting them here *in extenso*. "Prescriptions," says he, "were viewed by the modern lawyers, first with repugnance, afterwards with reluctant approval.*** This tardiness in copying one of the most famous chapters of Roman Law, which was no doubt constantly read by the majority of European lawyers, the modern world owes to the influence of Canon Law. The ecclesiastical customs out of the which the common Law grew, concerned as they were with sacred or quasi-sacred interests, very naturally regarded the privileges which they conferred, as incapable of being lost through disuse however prolonged; and in accordance with this view, the spiritual jurisprudence when afterwards consolidated, was distinguished by a marked leaning against Prescriptions. It was the fate of the Canon Law, when held up by the clerical lawyers, as a pattern to

secular legislature, to have a peculiar influence on first principles. It gave to the bodies of custom which were formed throughout Europe far fewer express rules than did the Roman Law, but then it seems to have communicated a bias to professional opinion on a surprising number of fundamental points and the tendencies thus produced progressively gained strength as each system was developed. One of the dispositions it produced was a disrelish for presumptions, but I do not think that this prejudice would have operated as powerfully as it has done, if it had not fallen in with the doctrine of the scholastic jurists of the realist sect, who taught that, whatever turn actual legislation might take, a *right*, how long so ever neglected, was in point of fact indestructible. The remains of this state of feeling still exist. Wherever the philosophy of law is earnestly discussed, questions respecting the speculative basis of prescription are always hotly disputed, and it is still a point of the greatest interest in France and Germany, whether a person who has been out of possession for a series of years is deprived of his ownership as a penalty for his neglect, or loses it through the summary interposition of law in its desire to have a *finis litum*''. English lawyers do not seem to have been much perplexed by these theoretical difficulties; the bent of English mind has always been practical and not speculative; they make the law, and leave the philosophy of law to take care of itself.

I may wind up this part of the discussion by saying a few words upon the Roman Law of Prescription. Before Justinian's time, the operation of possession in perfecting one's title was known as *usucapio*; the periods provided for the operation of usucapion were very short, being one year in the case of movables and two years in the case of immovables within *solum italicum*; moreover, to have this effect, possession must have commenced *bona fide*, and *ex justa causa*, *i.e.*, in some recognised method of acquiring property insufficient to create title by reason of some defect in form under the peculiar rules of Roman Law which required the peculiar ceremonies of mancipation for the transfer of *Res Mancipi*. The necessity of showing *justa causa* and the shortness

of the periods prescribed for the operation of usucapion clearly prove that it was at first used as a rude device to escape from the embarassments created by a crude system of conveyance; and hence when under Justinian's legislation, tradition took up the place of mancipation, usucapion was also superseded by prescription with the periods for its operation considerably lengthened: from one year to three years in the case of movables, and from two years to twenty years or ten years in the case of lands wherever situate, according as the adverse possession was held against a person present in the province or absent therefrom. Thus modified, the prescription under the Roman Law very much approached the prescription under the Hindu Law. There were, however, a few points of difference; in the first place, the period laid down for the operation of prescription in the case of movabales was shorter under the Roman Law than under the Hindu Law; in the second place, the Hindu Law does not seem to have allowed the rule of prescription to operate against an absent owner who knew nothing about the adverse possession; in the third place, where the possession had no *bona fide* beginning, a still longer period *viz.*, thirty years seem to have been required under the Roman Law to ripen the prescription which went under the name of *prescriptio longissimi temporis*, a provision with which we may compare the rule of the Hindu Law that when the adverse possession was not free from verbal protest a period of thirty years was necessary to put a stop to future disturbance of that possession. On the whole, the two systems exhibit accidental resemblances of a striking character, and where they differ, I can not say that the Hindu Law suffers from comparison. As regards the theoretical difficulties of prescription, they do not seem to have perplexed the Roman Jurists who allowed usucapion to be transferred into prescription by the mandate of the legislator when the cumbrous formalities of transfer were swept away to make room for simpler methods.

I shall now pass on to consider some of the exceptions to the applicability of the rule of prescription. They are mostly summed up in the text of Yājñavalkya which lays down that

the rule applies except in the the cases of pledges, boundaries, trust deposits, the wealth of idiots and infants, sealed deposits; and the property of a king, a woman, or a priest versed in the Vedas[7]. The principles on which these exceptions are based are not peculiar to the Hindu Law and similar exceptions are also to be found in other systems of Jurisprudence. Thus with regard to property entrusted to another by way of a pledge or a trust, so long as the pledge or trust continues there can be no prescription against the owner ; this is on the principle that derivative possession does not induce prescription, and although in the case of a pledge for custody (and not for use) and a trust deposit the pledgees and the bailee exceed their power in using or enjoying those things, still such enjoyment or use does not make their possession adverse against the owner who entrusted the things with them, the only difference that it makes being that he becomes entitled to compensation for the unauthorised use of his things in violation of the agreement under which possession was derived. There can be no prescription against a minor or an idiot because he is unable to protect his own interest and should, therefore, be protected by the law. Similar protection is also afforded to women by reason, as the *Mitākṣarā* puts it, of their ignorance and want of forwardness (*ajñānād aprāgalbhyāc ca*) with the exceptions made in favour of a King and a learned Brāhmaṇa, we may compare the maxim *nullum tempus occurrit regi aut ecclesiae*, and the *Mitākṣarā* justifies them on the ground that the king by reason of his numerous avocations, and learned Brāhmaṇa by reason of his absorption in spiritual studies and consequent inattention to secular concerns of life may be unmindful of the possession held adversely against them, and should, therefore, be exempted from the operation of prescription. As regards the exception in the case of encroachment overstepping intermediate boundary, the

7. Ādhisīmopanikṣepajaḍabāladhanair vinā/
Tathopanidhirājastrīśrotriyāṇāṁ dhanair api //*Yāj.* II. 25.
Vijñāneśvara in his commentary has explained the significance of each of the cases and he concludes in the following way :
Tasmāt ādhyādiṣu sarvatropekṣākāraṇasambhavāt samakṣabhoge nirākrośe ca na kadācid api phalahāniḥ.

Mitākṣarā says that in as much as bounderies are easily ascertainable by reference to permanent boundary marks it is not unlikely that one may look with indifference upon an encroachment by the neighbour, and hence omission to protest should not entail the consequence which attaches itself to unexplained negligence in asserting one's claim ;' you will understand that this explanation proceeds upon the view held by the *Mitākṣarā* that what the owner loses by adverse possession is not the property itself, but the usufruct, and that the loss is a sort of penalty for the owner's laches in opposing the possession in proper time, so that any excuse for non-opposition will furnish a ground for not enforcing the penalty ; the explanation, however, may not seem to be adequate on the view that prescription is a cause of loss of title in the property itself, and it may be suggested that the real explanation may be that encroachment in neighbouring field by overstepping the intermediate boundary is calculated to be of such a fitful character that it may not often attract attention and is not always capable of prevention, so that such acts ought to be regarded as isolated acts of tresspass and should not be allowed to ripen into a prescriptive title. Besides these exceptions, it was also laid down that there could be no prescription when the posession was permissive, being allowed through affection for a kindred or the like[8]; the reason is that in a case like this, possession can not be regarded as adverse. On the whole it may be safely asserted that the exceptions are all eminently reasonable, and they are founded on principles which have been adopted more or less in all systems of Jurisprudence.

There is another question discussed in Hindu Law relating to the effect of long possession which is so very similar to the question so long discussed that it is not impossible for one to overlook the distinction between the two and coufuse them with each other. The question is this : possession, as far as it goes, is evidence of title, for in the absence of evidence to the contrary, it should be presumed that the man in possession is the owner of the thing possessed ; but in as much as it is not unusual to find possession without title, and title without

8. Svaprītyā tūcyamānāni na naśyanti kadācana.

possession, bare proof of possession does not ordinarily exclude an enquiry into the question of title : and if it can be shown by independent evidence that the possession is not founded on title, then ordinarily the title will prevail over such possession. The question, therefore, arises whether under any circumstances evidence of possession can supersede the necessity of an enquiry, so as to entitle the person in possession to rely upon it alone as evidence of his title without recourse to any other evidence. This question has been answered by our law-givers, and I shall attempt to explain their position as briefly as I can.

Yājñavalkya declares that 'title preponderates over possession unless the latter be hereditary'[9]. This means that if a person proves his possession over a property, but cannot show how he acquired it, and another, although not in possession, proves his title by showing that he acquired the property in some recognised way of acquiring ownership, such as sale, gift, etc., then the title so proved must prevail over possession unless such possession is shown to be hereditary, being in fact a continuation of ancestral possession. The exception made in favour of hereditary possession indicates that such possession supersedes an enquiry into title, but it raises the question what hereditary possession means. Now there are texts to the effect that in order to have the desired effect, possession must have continued through three generations in the past. So Nārada says, that where possession has continued through three generations in the past including the father, it cannot be disturbed even if it was wrongful[10] ; and according to a text of Vyāsa, possession extending over one generation means possession for twenty years, so that possession for three generations

9. Āgamo' bhyadhiko bhogād vinā pūrvakramāgatāt. *Yāj*, II. 27.
Note here the clarifications in the *Mitākṣarā* :
Svatvahetuḥ pratigrahakrayādiḥ āgamaḥ. Sa bhogād abhy adhiko balīyān, svatvabodhane bhogasyāgamasāpekṣatvāt. Yathāha Nāradaḥ:
Āgamena viśuddhena bhogo yāti pramāṇatām/
Aviśuddhāgamo bhogaḥ prāmāṇyam naiva gacchati// *Nārada*, 1. 85.

10. Anyāyenāpi yad bhuktaṁ pituḥ pūrvatarais tribhiḥ/
Na tac chakyam apāhartuṁ kramāt tripuruṣāgatam// *Nārada*, 1. 91.

means possession for at least sixty years.[11] Aparārka however cites an anonymous text which lays down that possession for one generation should be taken to extend over thirty-five years.[12] The real significance of these texts is thus sought to be explained by the author of the *Mitākṣarā*; he says that the crucial distinction is between possession which had its begining within living human memory, and possession which extends beyond that, so that possession extending over three previous generations really imports possession from time immemorial; he argues that when possession had its begining within living memory, it may not be impossible to show that it was not founded on any valid title, whereas in a case of immemorial use, you can not say that it had no valid origin, since that origin is not within living human recollection, and that being so in this latter case all further enquiry into the question of title is practically superseded, and nothing remains to be done but to support the existing possession as incontestable and incapable of being lawfully disturbed. This position is supported by the text of Kātyāyana which clearly explains the ground of the rule ; it says that in a case of dispute about land, where possession had its beginning within living memory, possession accompanied by title has to be sought after, but where it is extended beyond human memory, there in as much as it is impossible to be certain about absence of title, possession descending through three generations must prevail[13]. That mere continuance of possession through three generations is not conclusive and is really meant to stand for a period beyond human recollection appears from the fact that

11. Varṣāṇi viṁśatir bhuktā svāminā vyāhatā satī/
Bhuktiḥ sā pauruṣī bhūmer dviguṇā ca dvipauruṣī// *Vyāsa*, Q in Vīr.

12. Tripauruṣī ca triguṇā na tv ānveṣya āgamaḥ/
Varṣāṇi pañcatriṁśat tu pauruṣo bhoga ucyate//

13. Ataś ca smaraṇayogye kāle yogyānupalabdhyā āgamābhāvaniścayasambhavād āgamajñānasāpekṣasyaiva bhogasya prāmāṇyam. Asmārte tu kāle yogyānupalabdhyabhāvenāgamābhāvaniścayāsambhavāt āgamajñānanirapekṣa eva saṁtato bhogaḥ pramāṇam. Etad eva spaṣṭīkṛtaṁ Kātyāyanena :
Smārtakāle kriyā bhūmeḥ sāgamā bhuktir iṣyate/
Asmārte' nugamābhāvāt kramāt tripuruṣāgatā// *Kātyāyana*, 321.

under extraordinary circumstances this may be compassed within a much shorter period so as to take the case out of the reason of the rule as explained in the text of Kātyāyana cited above. The utmost extent of human life, and therefore the extreme range of human memory is said by the *Mitākṣarā*, according to a text of the Veda, to be hundred years, but the real test must be understood to be furnished by the limits of living human memory which must be regarded in each particular case. The conclusion therefore seems to be this ; under ordinary circumstances, mere possession does not exclude an enquiry into title, for possession may lie with one person and title with another ; where, however, that possession has descended through three previous ancestors, it was thought that to render proof of title was superfluous, and some lawyers laid down that such possession, even if shown to be wrongful, could not be disturbed ; this period was stated by some sages to cover sixty years, and there is one text, which, if genuine, would make it cover one hundred and five years. It was perhaps considered, as the text of Kātyāyana would seem to indicate, that when possession continued through three successive generations, it could very well be regarded as having its origin beyond living human memory. The *Mitākṣarā* then takes its stand upon the reason of the rule, and contends that mere passing through three generations is not necessarily conclusive, for it is not inconceivable that under extraordinary circumstances such a thing may happen within a comparatively short time ; hence it concludes that it is only when the origin of possession is lost in obscurity by reason of its having commenced beyond living human recollection that enquiry into the question of title is superseded and possession, standing alone, justifies itself; for in such a case the presumption is that possession has, as a matter of fact, followed title.

Even then it allows that such presumption is not absolutly irrebuttable, a qualification which flows logically from the doctrine that possession is never an equivalent of title, but only presumptive evidence thereof; but this concession to logical consistency seems to be inconsistent with the text of Nārada cited above, which shows that in such a case, the

existing possession cannot be disturbed even it shows to be wrongful. On any view, the practical result is almost identical; in a case where possession has come down from time immemorial, it is not merely nine points, but ten points of title, and even when it had its origin within living recollection and enquiry into title is not therefore superseded, evidence of title being equally balanced, possession must prevail.

I hope you will now understand why I have kept this discussion into the effect of enjoyment from time immemorial quite apart from the discussion into the effect of enjoyment of a particular character and for a certain definite period in extinguishing the title of the real owner. Apart from the doctrine of the *Mitākṣarā* School that in no case can possession for a definite period having its beginning within living recollection extinguish the real owner's right to anything more than the usufruct already enjoyed, there is, even on a thorough recognition of the doctrine of extinctive prescription, this difference in principle between the two doctrines that enjoyment from time immemorial supersedes an enquiry into title by raising an almost irrebuttable (if not absolutely irrebuttable) presumption of lawful origin, while adverse possession for the prescribed period when it fulfils certain conditions operates by extinguishing the old title and thereby substituting a new title in its place.

It will now be interesting to compare with this doctrine of Hindu Law, similar doctrines in other systems of Jurisprudence. Thus it will be found that the doctrine of immemorial enjoyment has been recognised in public law, and is thus stated by Savigny: 'when a condition of things has lasted so long that the present generation never knew any other, and their forefathers knew no other, then it must be assumed that this condition of things is so bound up with the convictions, feelings and interests of the nation that it cannot be disturbed'. Vattel in his Law of Nations subscribes to the same doctrine, when he says that in addition to ordinary prescription 'there is another called immemorial, because it is founded on immemorial possession, the origin of which is unknown or so deeply involved in obscurity as to allow no possibility of proving

whether the possessor has really derived his right from the original proprietor or received the possession from another'.

As regards the Roman Law, Sir William Markby points out that 'Savigny considers that in the Roman Law the principle of time immemorial applied only to three kinds of rights—*viae vicinales* ; rights connected with the prevention of floods ; and rights connected with the supply of water. He seems to think that it was as being matters of public concern that the principle of time immemorial was applied to these rights. The notion of the Roman lawyers seems to have been that in regard to a thing *cujus memoriam vetustas excedit*, if the public were interested in it, they ought to treat the case in the same way as if a *lex* had authorised it. As regards the length of time which would be considered time immemorial, *cujus contrarii non extat memoria*. The *contrarii memoria* seems to mean a recollection of the time when no such right existed. If there is a *memoria* of this any presumption in favour of the right is excluded. And the result of the two passages in the Digest upon the subject appears to be that if any person comes forward and can say, either from his own recollection or from the information of others speaking from their own recollection that the thing was at one time illegal, the presumption will be excluded. But more ancient information than this as to any illegality would not be sufficient. One may ask why in the Roman Law, the doctrine of immemorial enjoyment was not applied to corporeal things ; I cannot answer the question with any amount of confidence, but I may be permitted to suggest that it was perpaps so, because the rule of *prescriptio longissimi temporis* would, on thirty years possession, make the possessor completely secure against any future disturbance by the previous owner, so that recourse to the doctrine of 'immemorial enjoyment' would hardly be necessary in such a case, while under the Hindu Law by reason of the doubt which has existed regarding the recognition of the doctrine of extinctive prescription and also by reason of the limitation under which alone it can be applied, the doctrine of 'immemorial enjoyment' cannot be regarded as similarly

superfluous. I may, however, venture to observe that the question of necessity or superfluity does not necessarily exclude considerations of logical consistency, and the foundation of the doctrine of 'immemorial enjoyment' being what it is, I do not quite see how the Roman Lawyers could, with a strict regard for the underlying principle, limit its application to a few incorporeal rights.

Turning now to the English Law, we find that it was very early recognised that long continued enjoyment of an incorporeal right *nec vi* (peaceably) *nec clam* (openly), and *nec precario* (as of right) would establish the right. In explaining long enjoyment, Lord Coke says that it has reference to 'the time given by law, which in England is the time whereof there is no memory of man to the contrary'. Sri William Markby points out that Littleton identified prescription and enjoyment from time immemorial, that he did not base its operation upon the presumption of a legal title, and that he assumed time immemorial to mean the time whereof there was no memory of man to the contrary. The English Lawyers following Littleton also adopted time immemorial as the basis of their law; but they at the same time (in this respect not following Littleton) adopted the principle that enjoyment from time immemorial was not a mode of acquisition, but only afforded a presumption of legal origin; but it so happened that shortly after the enactment of the Statute of Westminister in 1275, the English lawyers came to hold that nothing was beyond human memory which had its beginning since the time of Richard I, A.D. 1189. The result was that the protection afforded by English Law to long enjoyment was very slender, and gradually as the time which had elapsed since the time of Richard I became longer and longer, the protection so afforded became almost shadowy and ineffectual. Hence the Judges, about the end of the eighteenth century, tried, by a sort of fiction, to afford an ample protection to long enjoyment, by introducing the presumption of a modern lost grant; but it was, at all events, as Sir William Markby calls it, a clumsy legal fiction which has now been almost, though

not altogether, superseded by the provisions of the Prescription Act, also, called Lord Tenterden's Act, making the presumption of legal origin conclusive after an enjoyment of twenty years, provided the enjoyment fulfils certain conditions which I need not here explain. 'The Act' says Sir William Markby, 'does not make the prescription or the English Law any thing different from what it was before. It does not do away with the presumption of a legal origin. Nor does it even apply to all kinds of *jura in re aliena*, but only to those mentioned in the Act. The protection of other rights remains as before, and juries are still often gravely asked to presume that grants have been lost which no one belives ever to have existed.'

This, then, is the condition of the English Law, and if we compare with this the doctrine of the Hindu Law, which I have tried to explain above, it seems to me quite clear that the Hindu Law will not suffer from the comparison. It bases the protection afforded to long possession or enjoyment on a presumption of its legal origin, and then correctly traces the real foundation of the presumption in the continuity of the possession from time immemorial, then in determining what 'time immemorial' means, it does not fall into the error, if not the folly, of the English Law, of fixing upon a fixed point of time as the limit of living human recollection, although time flows, as it has always done and the distance from that fixed point increases every day, so that the protection sought to be afforded gradually dwindles away: then, again, in as much as the principle on which the rule is based is of universal application, the Hindu Law does not limit its application to this or that right, but allows it to have its full scope and operation wherever the reason of the rule applies. After this short comparative review I leave it to others to say whether the Hindu Law of Prescirption does not deserve the serious attention of every student of historical and comparative jurisprudence; and whether, in many of its features, it does not compare very favourably with some of the most advanced systems of Western law; it is unfortunate that the subject has not, up to the present moment, been

studied with the proper amount of care ; otherwise, I doubt not, it would have demonstrated how wonderfully the influence of universal reason permeating human institutions bridges over the gulf of time and space, and produces similarity of the most extraordinary kind.*

* It may be of interest to note here that the particular verse of Yājñavalkya (II. 24) has elicited critical discussion on adverse possession, specially with reference to the actual loss (hāni). Three theories are significant, namely, *svatvahāni*—the theory of loss of property ; *vyavahārahāni*—the theory of loss of remedy ; and *phalahāni*,—the theory of the loss of usufruct. These theories have been discussed in details with supporting śāstric texts by Dr. A. Thakur in his *Hindu Law of Evidence* (Calcutta, 1933), pp. 240-263. Vide also Kane, *History of Dharmaśāstra* III, Chap. XXI, pp. 317-329 for discussion on *Bhoga* (possession).

LECTURE V

THE LAW OF SUCCESSION

The scope of the present lecture—*Dāya*: what it means—According to the *Mitākṣarā*—According to the *Dāyabhāgha*—The two definitions compared—This furnishes one of the fundamental distinctions between the two Schools—*Janmasvatvavāda* contrasted to *Uparamasvatvavāda*—Acquisition of ownership by birth, how far it extends—The distinction between unobstructed and obstructed heritage—The distinction has no place in the *Dāyabhāga*—To what kinds of father's property does the peculiar *Mitākṣarā* doctrine apply?—Mayne's view—The opinion criticised—Nature of son's interest in father's ancestral property and in father's own acquisitions—Father's power of alienation without the concurrence of the sons—how far it extends—Self-acquired immovable property: Can the father alienate it at his pleasure without the concurrence of the sons?—Conflicting texts: how they can be reconciled.—Decision of the Privy Council in *Rao Balwant Singh* vs *Rani Kishori*—The Decision considered—Power of father over ancestral movables—The *Dāyabhāga* brushes all these distinctions aside—Father's power of alienation under the *Dāyabhāga*—Prohibitory texts do not affect the validity of the transaction—The positions summarised: *Mitākṣarā*—*Dāyabhāga*. Is there any recognition of son's right in father's property during his lifetime in the *Dāyabhāga*—The position of the son compared to that of *sui heredes* in the Roman Law—Striking resemblances: What they seem to indicate—Distinction regarding the devolution of property on the death of a member of a joint family between the *Dāyabhāga* and the *Mitākṣarā* Schools.—*Dāyabhāga*—*Mitākṣarā*—How far the difference can be deduced from the corresponding difference regarding the conception of co-ownership in an undivided family—Severence of co-ownership as defined in the *Dāyabhāga*—The *Mitākṣarā* definition—The difference explained—*Prādeśikasvatvavāda*—*Sāmudāyikasvatvavāda*—Relation of the doctrine of survivorship with the *Mitākṣarā* and the *Dāyabhāga* conceptions of co-ownership—The transition from the conception of co-ownership to the course of devolution laid down in each School is natural; but is it absolutely necessary?—Raghunandana's criticism of the *Dāyabhāga* conceptions of co-ownership and partition—Śrīkṛṣṇa Tarkālaṅkāra's view—Nīlkaṇṭha adopts the *Dāyabhāgha* conception of co-ownership—Conclusions deduced from the above—Power of alienation of an undivided co-parcener: difference between the *Dāyabhāga* and the *Mitākṣarā* Schools—The *Mitākṣarā* view—Exception to the restriction on alienation—Judicial departure from the strict *Mitākṣarā* view—The

right of a *Dāyabhāgha* co-percener to alienate his own share explained—Texts to the contrary how reconciled—Śrīkṛṣṇa's exposition of the *Dāyabhāga* view—Ground of the distinction between the two Schools—Can a *Dāyabhāga* co-parcenar alienate the entire joint property, or one entire undivided property out of the joint property ?—Can such an alienation be regarded as partially valid ?—Answer suggested by Vācaspati Bhaṭṭācārya quoted by Jagannātha—The possition of cognates : Difference between the *Mitākṣarā* and the *Dāyabhāgha* Schools—The *Mitākṣarā*—The position of a daughter's son—Suggested explanation for the peculiar favour shown to him—The *Dāyabhāga* ; the principle of spiritual benefit —Result of its application—Manu's text : how explained and applied by Jīmūtavāhana—Difference between the two Schools summarised—How far the principle of spiritual benefit is a guiding principle in the *Dāyabhāga* law of succession : explained—The principle of propinquity, the guiding principle of the *Mitākṣarā* law of succession—Is the principle of spiritual benefit ever recognised in the *Mitākṣarā* School ?—Preference of agnates in other systems of Jurisprudence—The Roman Law—Why the seeming anomaly involved in the general preference of agnates was not keenly felt by the *Mitākṣarā* Hindus—Innovation of the Bengal School explained—Mr. Mayne's explanation considered—The influence of Brāhmaṇism ; how far it furnishes an explanation for the altered course of succession laid down by the *Dāyabhāga*—The gradual disruption of the old family system : how it explains altered cause of succession—Principles common to both the Schools—The exclusion of females unless admitted by virtue of special texts—A corollary from the position of a female in the organisation of the ancient Aryan Society—Admission of sister in the line of succession by the *Vyavahāramayūkha*—How the Bombay High Court has made room for other females—The course adopted by Madras High Court. Is it justified by the *Mitākṣarā* ?—The conclusion—The difference between the two Schools—Exclusion from inheritance. Grounds cf exclusion classified—The point of time at which the ground of exclusion must exist in order to lead to the exclusion—The position according to the *Dāyabhāga*—According to the *Mitākṣarā*—Subsequent removal of disqualification : its effect—Two other principles often pronounced to be principles of Hindu Law—Succession can never remain in abeyance—A logical deduction from the conception of succession —Difference from the Roman Law—An estate once vested cannot be divested—Not a special principle of the Hindu Law—Nor of universal application—Exceptions—The basis of the principle explained.

THE SUBJECT of the present lecture is the Law of Succession. It will be readily understood that I do not propose to enter into a discussion of the details of the subject ; my only aim is to explain some of the fundamental principles which furnish

the key to the understanding of the law of succession as unfolded by the *Mitākṣarā* and the *Dāyabhāga* Schools; these principles when properly understood, will elucidate how and in what respects the *Mitākṣarā* and the *Dāybhāga* Schools differ from each other, and the elucidation of these differences will, I hope, clear up much that seems to be obscure to a student who, without being initiated into the secret which gives, as it were, an entrance into the interior of the shrine, merely tries to gather as much information as he can by peeping from outside. Knowledge of isolated details so long as they are not deduced from and connected with their underlying principles is, however, as slippery as it is confusing, and it is better to have a firm grasp over a few fundamental principles than to collect mechanically a mass of disjointed details.

I have used the word 'Succession' to describe the subject-matter of the present lecture, but, I am afraid, that the word has been somewhat loosely used, since, as you will see, we shall have to deal not only with acquisition of ownership through kinship after the cessation of the interest of the last holder, but also with acquisition of ownership throuh the same source along with the last holder. Speaking generally, therefore, we may say that the scope of the present lecture is to deal with acquisition of ownership through kinship to the last holder independently of any voluntary act on his past designed to have this effect.

The word used to denote property which has devolved upon a person in this manner is *Dāya*. The *Mitākṣarā* explains this terms as signifying 'the wealth which becomes the property of another solely by reason of his kinship to the owner'[1] and

1. Dāyaśabdena yad dhanaṁ svāmisambandhād eva nimittād anyasya svaṁ bhavati tad ucyate. *Mitākṣarā* on *Yāj*. II. 114.

It may be noted in this context that the word *dāya* has been used several times in the Vedic literature in the sense of wealth or share. For the latter sense the *Ṛgvedic* passage: śramasya dāyaṁ vibhajantebhyaḥ. (X.114.10) may be cited. In the same text (II.32.4) the expression '*śatadāyam*' is likely to refer to a person having hundred (variety of wealth). The passage of the *Taittirīyasaṁhitā*: Manuḥ putrebhyo dāyam vyabhajat (III.1.9.4) may be interpreted as having reference to heritage, a meaning of the word *dāya* recorded in the Dharmaśāstra texts. Other Vedic references

the word 'solely' (*eva*) is intended to exclude the co-operation of any other cause such as a gift or a sale on the part of the owner and to lay stress on the fact that it is the relationship alone that determines the accrual of ownership. The *Dāyabhāga*, on the otherhand, defines the term as signifying 'the wealth in which property, dependent of kinship to the former

to the word *dāya* have been discussed in P. V. Kane's *History of Dharmaśāstra*, Vol. III, pp. 543-544; and in *Dharmakoṣa, Vyavahārakāṇḍa*, Vol. I, Part II, pp. 1120 ff.

The *Nighaṇṭu* perhaps contains the oldest definition of *dāya* in the line: Vibhaktavyaṁ pitur dravyṁ dayam āhur manīṣinaḥ. (Quoted in the *Smṛticandrikā*, II, p. 597). A definition of the same by Bṛhaspati has been recorded in the *Sarasvatīvilāsa*, p. 344:

Dadāti dāyate pitrā putrebhyaḥ svasya yad dhanam/
Tad dāyam........ //

Vide also *Bṛhaspatismṛti.* (Ed. Aiyangar) p. 195.

The definition of *dāya* by Vijñāneśvara has been followed by a good number of digest-writers and commentators except those belonging to the Bengal school led by Jīmūtavāhana. Devaṇabhaṭṭa refers to the traditional view according to which *dāya* refers to wealth that comes through father and the like and which is to be divided. He quotes the text of Saṁgrahakāra and Dhāreśvara and explains them:

Vibhāgārhapitrādidvārāgate dravye vṛddhāḥ dāyaśabdam āhur ity arthaḥ. Ata eva Dhāreśvareṇaivam evoktam: 'dāyaśabdena pitṛdvārāmātṛdvārāgataṁ ca dravyam evocyate iti...... Evañ cānyasambandhini dhane vibhāgārhadāyaśabdo vartata iti Nighaṇṭukāroktam iti mantavyam... ata eva Saṁgrahakāraḥ:

Pitṛdvārāgataṁ dravyaṁ mātṛdvārāgataṁ ca yat/
Kathitaṁ dāyaśabdena......... //

Smṛticandrikā, Vyavahārakāṇḍa, pp. 597-8.

In the Sarasvatīvilāsa it has been defined as the object which belongs both to the father and the son alike: Anena pitāputrasamudāyaviṣayakaṁ dravyaṁ dāyam iti sāmānyalakṣaṇam. After making reference to the definitions by Bhāruci, Aparārka and others, he supports the same and observes: Tad eva samyak, dharmavibhāge dravyavibhāge 'py anugateḥ. (p. 345). His discussion on the point is highly informative. The author exhibits boldness in his criticism of the definition even by Vijñāneśvara and Asahāya (not traced in the edition of the *Nāradasmṛti* by Jolly):

Asahāya-vijñanayogiprabhṛtīnāṁ tu yat svāmisambandhād eva nimittād anyasya svaṁ bhavati tad dāyaśabdenocyate iti, tan na sahante bhārucyaparārkaprabhṛtayaḥ, svatvahetūnām krayādīnāṁ tallakṣaṇāsambhavāt. Na ca vācyam evakāreṇa krayādayo vyudasyante, kretari dayādo dāyaṁ gṛhṇātīti laukikaprayogābhāvād iti.

owner, arises upon the cessation of his ownership thereof.'[2] On a comparison of the two definitions, you will observe that according to the *Mitākṣarā*, it is not absolutely necessary that the ownership of a person must cease in order that his kinsmen may step into his shoes and acquire ownership in his property, but that, according to the *Dāyabhāga*, the cessation of the ownership of a person is a condition precedent to the acquisi-

The text of Bhāruci on the commentary of the *Manusmṛti* (X.115) contains the following definition : Dāyaṁ pitryaṁ jñātidhanaṁ vā. (Vide Bhāruci's commentary on the *Manusmṛti*; Vol. I, the Text and Vol. II, the translation and the notes, creditably edited by J. D. M. Derrett. Franz Steiner Verlag Gmbh. Wiesbaden, 1975) It may be noted here for information that Medhātithi in his explanation of the same verse of Manu speaks of *dāya* as : anvayāgataṁ dhanam.

Mādhava in his *Parāśarabhāṣya* just follows the definition presented by Vijñāneśvara. P. 326.

In this *Vyavahāramayūkha* Nīlakaṇṭha defines *dāya* as the wealth that is to be divided and which is not the wealth of the reunited members. The word 'asaṁsṛṣṭa' has been inserted in the body of the definition for excluding such wealth as is lumped together in a business for profit: Asaṁsṛṣṭaṁ vibhajanīyma dhanaṁ dāyaḥ Lābhādyarthasaṁsṛṣṭadhana-vyāvṛttaye saṁṣṛṣṭam iti. Vaṇigbhir ekīkṛtya vibhajyamāne dāyabhāga-śabdāprayogāt. P. 93 (Edn. P. V. Kane).

2. Tataś ca pūrvasvāmisambandhādhīnaṁ tatsvāmyoparame yatra dravye svatvaṁ tatra nirūḍho dāyaśabdaḥ.

By way of explaining the implication of the terms utilised in the definition by Jīmūtavāhana, Śrīkṛṣṇa Tarkālaṁkāra, the celebrated commentator of the text has the following observations : 'Krītādāv ativyāptivāraṇāyādhīnāntam. Atra tu pūrvasvāmīty avivakṣitaṁ sambandhādhīnatvasyaiva vyāvartakatvāt. Sambandhaś ca śāstraprā-ptaputratvādyanyatamaḥ na tu kretṛtvādiḥ, krayasya sambandhādhīnas-vatvaṁ praty ahetutvāt kintu krayādhīnasvatvaṁ praty eva tasya hetutvam. Vidyamānapatisvatvake dāmpatyasambandhādhīnapatnīsva-tvāśraye 'tivyāptivāraṇāya tatsvāmyoparme iti. Tathā ca tāvad anyatama-sambandhādhīnaṁ sat yad pūrvasvāmisvatvanāśajanyasvatvaṁ tadvati dhane nirūḍho dāyaśabdaḥ.

Dāyabhāga (Ed. Bharata Śiromaṇi), p. 11.

For detailed notes on the implications of each word in the definition as also other commentaries and sub-commentaries on the definition of *Dāya* by Jīmūtavāhana vide the edition of the *Dāyabhāga* by H. N. Chatterjee, (Calcutta, 1976).

This definition of *Daya* by Jīmūtavāhana has been commented on by Mitramiśra, a late follower of Vijñāneśvara. In his words :

tion of ownership by his kinsmen by virtue of the relationship that exists between them. The difference between the *Dāyabhāga* and the *Mitākṣarā* doctrines, which forms one of the fundamental distinctions between the two schools governed by those two works, therefore, consists in this : according to the *Dāyabhāga*, ownership to a person's property by virtue of kinship to that individual arises only when that person's ownership comes to an end which happens usually on his death, so

Yat tu Jimūtavāhanena tadanuyāyinā Vyavahāratattvakṛtā ca 'dīyata iti ...dāyaśabda...ity uktaṁ, tan na sundaraṁ, nirūḍhatvāṅgīkāre dāyadadātiśabdayor gauṇatvopanyāsānarthakyāt sarvathāvayavārtharāhitye hi nirūḍhatvam. Na ca yogarūḍhatvam avayavārthatāltasya svayam evopapanyāsāt. Gauṇam avayavārthaṁ parikalpya tadaṅgīkārasya nisprayojanatvam anyonyāśrayatvam anubhavavirodho vyāghātaś ca. 'Tatsvāmyoparama' iti janmanāpi svatvasyopapādayiṣyamāṇatvād avyāpakam. *Vyavahāraprakāśa*, p. 412.

Incidentally the points raised in the context of *Dāya* in the *Smṛti candrikā* of Devaṇabhaṭṭa may be mentioned here :

Kiṁ punar dāyākhyadravyam ity apekṣite Nigaṇṭukāreṇoktaṁ 'vibhaktavyaṁ pitṛdravyaṁ dāyam āhur manīṣiṇaḥ' iti. Vibhāgārhapitrādidvārāgate dravye vṛddhā dāyaśabdam āhur ity arthaḥ. Ata eva Dhāreśvareṇaivam evoktam—dāyaśabdena pitṛdvārāmātṛdvārāgataṁ ca dravyam evocyate iti. Caśabdaḥ sambandhyantaradvārāgatadravyam api dāyaśabdenocyata iti sūcanārthaḥ. Evaśabdas tv anāpannasvatvarūpam iti jñāpanārthaḥ. Sa ca ayuktaḥ, āpannasvatvarūpasyaiva dravyasya pitṛdvārā putrapautreṣv āgamanāt. Evañ cānyasambandhini dhane vibhāgārhadāyaśabdo vartata iti Nighaṇṭukāreṇoktam iti mantavyam.

Vyavahārakāṇḍa, Pt. II, pp. 597-8.

Reference also is to be made here of the discussion made by Pratāparudra in his *Sarasvatīvilāsa* :

Dāyo nāma pitāputrasamudāyadravyam, 'pitṛdravyaṁ vibhaktavyaṁ dāyam āhur manīṣiṇaḥ' iti smṛteḥ, Vibhaktavyaṁ vibhāgārhaṁ. Bṛhaspatir api, 'dadāti dīyate pitrā putrebhyaḥ svasya yad dhanam/Tad dāyam....' iti. Pitā putrebhyo yad dhanaṁ dadātīti kartrantapitṛśabdodhyāhartvyaḥ. Evaṁ dāyaśabdaḥ karmaṇya eva vyutpanna iti. Anena pitāputrasamudāyaviṣayakaṁ dravyaṁ dāyam iti sāmānyalakṣaṇam...... Bhārucyapārārarkādīnāṁ lakṣaṇaṁ, vibhāgārhaṁ pitṛdravyaṁ dāyam iti. Tad eva ṣamyak, dharmavibhāge dravyavibhāge' py anugateḥ. Na ca vācyaṁ, dharmāṇām agnihotravaiśvadevādīnāṁ pitṛdravyatvābhāvāt vibhaktavyaṁ pitṛdravyam iti lakṣaṇasya tatrānugatir nāstīti. Paitṛkadhanaṁ dvividhaṁ, bhoktavyam anuṣṭhātavyaṁ ca iti Viṣṇuvacanena bhoktavyaṁ kṣetragavādikaṁ anuṣṭhatavyam agnihotrādikam iti anuṣṭhātavyasyāgnihotrādeḥ paitṛkatvasya pratipādanāt.

Sarsvatīvilāsa, pp. 344-5. (Mysore University Edn.)

that before this, no one, however close his relationship to the owner may be, can claim to have acquired an owner's right to the property which still belongs to his relation. Heirship, according to the *Dāyabhāga*, is, therefore, succession in the strict sense of the term by reason of kinship to the former owner, or to be more precise, of kinship to and survival of the former owner. According to the *Mitākṣarā*, on the other hand, there are certain relations who, at the moment of their birth, acquire ownership in the property of their relations, so that the accrual of ownership does not, in their case, depend upon the cessation of the ownership of the previous owners, but they, along with their relations, the previous owners, become co-owners of the same property. Thus, in their case, it may be said that it is their birth that is the cause of the accrual of their ownership, and hence this doctrine has been designated as *janmasvatvavāda* or the doctrine of acquisition of property by birth[3], as distinguished from the *Dāyabhāga* doctrine, which, for contrast, may be characterised as *uparamasvatvavāda* or the doctrine of the acquisition of ownership upon the demise of the last owner.

3. Vijñāneśvara in his Mitākṣarā commentary has a long discussion on the point and for reference here only the relevant portions are being mentioned :

He first discusses whether *Svatva* is determined exclusively by the Śāstric precepts or through other agencies—'Kiṁ śāstraikasamadhigamyaṁ svatvam uta pramāṇāntarasamadhigamyam'. By way of criticism of the first proposition Vijñāneśvara observes : Laukikam eva svatvaṁ laukikārthakriyāsādhanatvāt vrīhayādivat. Āhavanīyādīnāṁ hi śāstragamyānāṁ na laukikakriyāsādhanatvam asti......api ca pratyantavāsinām adṛṣṭaśāstravyavahārāṇāṁ svatvavyavahāro dṛśyate, krayavikrayādidarśanāt. Kiñ ca niyatopāyakaṁ svatvaṁ lokasiddham eveti nyāyavido manyante.

On the basis of the secular nature of *Svatva* this commentator argues in the following way : Lokaprasiddham eva svatvam ity uktam. Loke ca putrādīnāṁ janmanaiva svatvaṁ prasiddhataraṁ nāpahnavam arhati. Vibhāgaśabdaś ca bahusvāmikadhanaviṣayo lokaprasiddhaḥ nānyadīyaviṣayo na prahīṇaviṣayaḥ ; tathā utpattyaivārthasvāmitvaṁ labhetety ācāryaḥ iti Gautamavacanāc ca. Maṇimuktāpravālānām ityādivacanaṁ ca janmanā svatvapakṣa evopapadyate. Na ca pitāmahopāttasthāvaraviṣayam iti yuktaṁ, na pitā na pitāmahaḥ iti vacanāt. Pitāmahasya svārjitam api putre pautre ca saty adeyam iti vacanaṁ janmanā svatvaṁ gamayati. Vijñāneśvara's introductory note on the *Yāj. Saṁ*, II. 114.

You must, however, remember that even, according to the *Mitākṣarā*, the acquisition of property by birth is limited only to a very few relations, *viz.*, the son and other direct male descendents of the owner. The *Mitākṣarā* in speaking of the relations who thus acquire a co-ownership by their very birth makes mention of sons and grandsons, but the *Vīramitrodaya* explains that the great-grandsons are also included in the same category. Beyond these the principle of acquisition of co-ownership by birth does not extend, as regards other relations they succeed in the same ways as heirs under the *Dāyabhāga* School upon the demise of the previous owner. Upon this distinction between the two classes of relations is founded the *Mitākṣarā* classification of *Dāya* into the two divisions of *apratibandha* (unobstructed) and *sapratibandha* (obstructed). The classification is thus explained in the *Mitākṣarā* : 'The wealth of the father or the paternal grand-father becomes the property of his sons or grandsons, in right of their being his sons or grandsons ; and that is a devolution of property not subject to obstruction. But property devolves upon parents, (or uncles) brothers and the rest, upon the demise of the owner if there be no male issue ; and thus the actual existence of a son and the survival of the owner, are impediments to the succession ; and on their ceasing, the property devolves upon the successor in right of his being uncle or brother. This is an inheritance subject to obstruction[4]'. The characteristic difference between the two classes is therefore this, that in a case falling under the former class title arises immediately upon the birth of the kinsmen so that nothing can impede its accrual, while, in a case falling under the latter class the accrual of title is

4. Sa ca dvividhaḥ—apratibandhaḥ sapratibandhaś ca. Tatra putrāṇāṁ pautrāṇaṁ ca putratvena pautratvena ca pitṛdhanaṁ ca svaṁ bhavatīty apratibandho dāyaḥ. Pitṛvyabhrātrādīnāṁ tu putrābhāve svāmyabhāve ca svaṁ bhavatīti sapratibandho dāyaḥ. On *Yāj.* II. 114.

For clarification of these points vide the *Subodhinī sub*-commentary :

Ayam abhisandhiḥ : vidyamāneṣu svamisambandheṣu yasyāvyavahitaḥ svāmisambandhaḥ tasya apratibandho dāyaḥ, yasya vyavahitaḥ svāmisambandhaḥ tasya sapratibandho dāyaḥ. On *Mit.* on *Yāj. Saṁ*, II. 114.

Vide also *Vyavahāramayūkha* of Nīlakaṇṭha, p. 93 and the *Madanaratnapradīpa* p. 321 for identical classification and interpretation.

merely contingent upon the non-existence of an heir belonging to a superior class and the survival of the claimant on the demise of the previous owner; so that there being these impediments to the succession it cannot be said until the demise of the last owner whether the title in question will or will not arise. You will at once understand that this distinction between devolution of property 'subject to obstruction' and 'not subject to obstruction' has no place in the doctrine of the *Dāyabhāga* School, for according to it neither the son nor any other kinsman acquires any title by birth, so that until an owner dies no one can say who will succeed to his property and, therefore, even the succession of the son is liable to be obstructed by the survival of the father; thus the result is, that if you choose to employ the expression 'succession' under the *Dāyabhāga* School, it must always be regarded as *sapratibandha* (liable to obstruction)[5].

I have explained that according to the *Mitākṣarā*, the son acquires co-ownership with the father from the moment of his birth. It may, however, be asked whether this is limited to the ancestral property in the hands of the father which has devolved upon him as unobstructed property from his paternal ancestors or also extends over other kinds of property of the father including property inherited by him from persons other than his paternal ancestors and his self-acquisition. Mr. Mayne says 'that all property which a man inherits from a direct male ancestor, not exceeding three degrees higher than himself, is ancestral property, and is at once held by himself in coparcenary with his own issue. But where he has inherited from a collateral relation, as for instance from a brother, nephew, cousin, or uncle, it is not ancestral property; consequently his own descendents are not coparceners with him'[5a]. Similarly he maintains that property inherited by a man from a female or through a female, not being ancestral

5. Vide here the observations of Kamalākara in *Vivādatāṇḍava*:
Te sarvatra sapratibandhasyaiva dāyasya sattvāt rikthasaṁvibhāgayor bhedābhāvāt Gautamavirodhāt pūrvoktayuktivirodhān mūrkhā eva. Vide the Edn. of the text. *Dāya* section only, by H. Chatterjee in *Our Heritage*, Vol. II. pt. II. July-Dec. 1959, p. 1. ff.

5a. Mayne's Hindu Law, p. 344.

property as explained above partakes of the same character as property inherited from a collateral; and with regard to father's self-acquisition he says that *ex-vi-termini* it does not belong to the co-heirs.[5b] Now, it seems to me that this statement of the *Mitākṣarā* law is not strictly accurate, although the inaccuracy, such as it is, may not make much difference in the result. As I understand the *Mitākṣarā,* the right acquired by a son by birth in the property of his father is not limited to any particular kind of property, but extends over all the property of the father however acquired. Thus after an elaborate discussion on the maintainability of the doctrine that property arises by birth, the *Mitākṣarā* concludes that therefore (*i.e.* on the grounds already set forth) it is certain that property in the paternal as well as grand-paternal (*paitāmaha*) estate arises by birth[6]. Now in this passage the separate mention of paternal and grand-paternal (*i.e.* ancestral) estates as being both subject to the accrual of son's right by birth implies, that the son acquires his right by birth in all the properties of his father whether it be ancestral or not, and this conclusion is further strengthened by the fact, that in winding up the discussion, the *Mitākṣarā* says that 'although property arises by birth in paternal as well as grand-paternal (ancestral) estate, we shall mention a distinctive peculiarity in dealing with the text 'land acquired by grandfather etc.', the peculiarity so promised to be subsequently stated being, that in regard to property derived from the grandfather, the father's right of free alienation is restrained by the co-equal co-ownership of the son, while in regard to the properties acquired by the father himself (whether by collateral succession or any other

5b. Ibid. p. 451.

6. Tasmāt paitṛke paitāmahe ca dravye janmanaiva svatvaṁ, tathāpi pitur āvaśyakeṣu dharmakṛtyeṣu vācanikeṣu prasādadānakuṭumbabharaṇā-padvimokṣādiṣu ca sthāvaravyatiriktadravyaviniyoge svātantrayam iti sthitam. Sthāvare tu svārjite pitrādiprāpte ca putrādipāratantryam eva,

Sthāvaraṁ dvipadaṁ caiva yady api svayam arjitam/
Asambhūya sutān sarvān na dānaṁ na ca vikrayaḥ//
Ye jātāḥ ye 'py ajātā vā ye ca garbhe vyavasthitāḥ/
Vṛttiṁ te 'pi hi kāṅkṣanti na dānaṁ na ca vikrayaḥ//

ityādismaraṇāt.

mode of acquisition) the son has no right to object to the father's alienation but must acquiesce therein.' The distinction thus stated does not, as Mr. Mayne seems to think, indicate that the son's right by birth is limited only to the ancestral property in the hands of the father, but it only shows that although the right extends over all the properties of the father yet the son cannot oppose an alienation by the father except in the case of ancestral property. This is made quite clear by the following passage in the *Mitākṣarā*: 'consequently the difference is this: although he has a right by birth in his father's and in grandfather's property, still, since he is dependent on his father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since, both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating the property).'[7] It may be that this recognition of ownership in the son while he has no power to control the action of the father either by restraining him from alienating the property or by forcing him to come to a partition is not of much value; still it is nonetheless important to have a clear and correct idea of the scope of the doctrine which I am so long seeking to explain, together with such qualification as it may be subject to. My conclusion, then, is that the right which a son acquires by birth in his father's property is not limited to ancestral property alone, but extends over the entire property of the father, although the extent of the right is not everywhere the same but depends on the nature of the property.

What has been stated above with regard to the father's power of alienation without the concurrence of the son may suggest that the father is absolutely free to dispose of his self-acquired property in any way he likes, and that so far as the ancestral property is concerned he has no power of alienation except with the consent of the son. Both these propositions,

7. Paitṛke paitamahe ca svāmyaṁ yadyapi janmanaiva, tathāpi paitṛke pitṛparatantratvāt pituś cārjakatvena prādhānyāt pitrā viniyujyamāne svārjite dravye putreṇānumatiḥ kartavyā paitāmahe tu dvayoḥ svāmyam aviśiṣṭam iti niṣedhādhikāropy astīti viśeṣaḥ. Mit. on *Yāj*, II. 121.

however, seem to require qualification, the first with regard to self-acquired immovables, and the second with regard to ancestral movables. As regards the self-acquired immovable property of the father, you have observed that in a passage which I have cited from the *Mitākṣarā* it is stated generally that 'since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of own acquired property.' This would seem to indicate that the father can dispose of his self-acquired property, whether it be movable or immovable, in any way he likes, and the son must acquiesce in it. There is however an earlier passage which seems to lay down a different rule, for it is stated there that 'the father is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor, since it is ordained, 'though immovable or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made'. There is thus an apparent conflict between these two passages, and the question is how to reconcile them. The most obvious way of reconciling them is to read the special rule having relation to the father's immovable property as an exception to the general rule regarding the father's acquired property of all kinds, so that the father's uncontrolled right of alienation will, on this interpretation, be restricted to properties other than immovable. This view seems to find support from the *Vīramitrodaya*. It says that 'although the ownership of the sons and grandsons in the property of the father and the grandfather arises by birth alone, still by reason of the texts previously stated, the sons being dependent on the father, with respect to the father's self-acquired property, and the father being entitled to superiority on account of his being the acquirer, the sons must give their assent to the disposal by the father of his self-acquired property excepting land and slaves, by reason of the

previously cited text, namely—'immovables and bipeds' etc.' In another passage it is pronounced that 'of immovable property, whether ancestral or self-acquired, the father may make gift and the like only with the consent of the sons by reason of the text previously cited, *viz.*—'Immovables and bipeds, although acquired by a man himself, shall not be gifted away or sold without the consent of all the sons'. It has, however, been decided by the Privy Council in the case of Rao Balwant Singh *vs.* Rani Kishori[8] that the passage in which the *Mitākṣarā* prohibits the alienation of his self-acquired immovable property by the father without the assent of the sons merely lays down a rule, founded on moral and religious considerations, which carries with it no legal obligation. Referring to the apparent conflict in the *Mitākṣarā*, their Lordships observe that 'all these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws with rules intended for positive laws'. It is, as their Lordships think, the most reasonable inference that the precepts in the *Mitā.I* Sec. I, belong to the former class of precepts, and of sections 4 and 5 to the latter. Now I am quite free to admit that the text 'Immovables and bipeds etc.' on which the *Mitākṣarā* relies in support of its position that a father should not dispose of his self-acquired immovable property without the assent of his sons has the appearance of being a moral or religious injunction, since the maintenance of children born and unborn which is brought forward as a ground for the prohibition seems to suggest that the precept is directory and not mandatory in its character. At the same time it may be pointed out that in chapter I, Sec. I, the *Mitākṣarā* specially refers to several directions relating to alienation of property and expressly declares that any violation of them will not in any way affect the validity of the transaction and explains the purposes for which they are introduced. This will appear from paragraphs 31 and 32 where the *Mitākṣarā* discusses the formalities of alienation of immovable property to which I have already referred in my last

8. 25 I. A. 54 ; S. C. 26 All 267.

lecture, and from paragraph 30 which deals with the requirement of the consent of separated kinsmen and points out that 'among separated kindred, the consent of all tends to the facility of the transaction, by obviating any future doubt whether they be separated or united ; it is not required on account of sufficient power in the single owner ; and the transaction is consequently valid even without the consent of of the separated kinsmen'. So it is abundantly clear that in writing chapter I, Sec. I, the author of the *Mitākṣarā* was not unmindful of the distinction that exists between the rules 'intended for positive laws' and rules not so intended, and in the very section he points out how several rules deducible from the texts of the *Dharmaśāstras* should not be treated as 'intended for positive laws', and would not, if not complied with, affect the validity of the transaction. That being so, is it at all unreasonable to presume that if he had not considered it essential for the validity of the transaction that the sons should consent to the alienation of father's self-acquired immovable property, he would have expressly said so, just as he did in relation to the consent of separated kinsmen, co-villagers, and neighbours ? Moreover the expression used in the the *Mitākṣarā viz.*, 'subjection to the control of the son and the rest (*putrādipāratantrya*) to denote the limitation of father's power of alienation does seem to indicate a mere moral rule but a real limitation of power intended to have a legal bearing. It is, therefore, not at all clear that the way in which their Lordships of the Privy Council have attempted to reconcile the apparent conflict between the two passages in the *Mitākṣarā* is correct, and I am not sure that they have not departed from the strict *Mitākṣarā* law under a misconception that the distinction between a legal rule and a moral or religious recommendation was not quite familiar to it, a misconception which is all the more inexplicable because in the very section with which they were concerned (*viz.*, chap. I, Sec. I) there is ample evidence to show that the distinction was fully recognised and its importance clearly appreciated by the author. It may, however, be asked that if the consent of separated

kinsmen, co-villagers and neighbours be regarded as non-essential, why should the consent of the son with reference to the present question be not treated in the same light? It seems to me that there is a very reasonable answer to this question and it is this: the consent of separated kinsmen, co-villagers and neighbours could not be required on account of any sort of ownership that they could claim in the property to be transferred, for in fact they had none, and as the transferer had thus full dominion over the property an alienation by him would on the principles, explained by me in the last lecture, pass a good title without that consent. The *Mitākṣarā*, therefore, explains the requirement of the consent in these cases on the ground that it was either required to give a greater publicity to the transaction or to prevent the possibility of a future dispute. The son, however, acquires by birth an interest in the property of the father, and this, as I have explained above, is not limited to ancestral property but also extends over the self-acquired property of the father apparently, therefore, in the absence of any special ground the father cannot be said to have absolute dominion over his self-acquired property in as much as the son has, also acquired an interest therein from the moment of his birth. Hence, the consent of the latter to an alienation by the father of such property cannot, on ordinary principles, be regarded as non-essential, unless it be possible to assign some special ground for considering otherwise. The *Mitākṣarā* however, says that in the case of self-acquired property of the father such a special ground does exist since by reason of the dependence of the son on him, and also in view of the predominant interest which he has in his self-acquired property, the son cannot oppose an alienation by him of such property, but should rather acquiesce therein. Now, it may be here observed that the *Mitākṣarā* does not say that the consent of the son is not at all necessary, but points out that in as much as it is the duty of the son to give his consent in such a case, he cannot oppose the transaction on the ground that his consent has not been obtained; with regard to immovable property, however, a distinction may very well be drawn, and it may be fairly contended that

in as much as the *Śāstras* prohibit an alienation by the father without the son's consent, the latter may legitimately withhold his consent to a dissipation by the father of his immovable property although he may have acquired it himself, and by the reason of co-ownership which the son has acquired from his birth, this consent cannot be regarded as non-essential to the validity of the transaction. This position is further strengthened by the fact in the *Mitākṣarā*[9] as well as in the *Vīramitrodaya* the dependence of the father in making an alienation of immovable property, whether ancestral or self-acquired, is laid down in one and the same sentence and it would be opposed to the well-known canon of construction that a word once pronounced can convey only one meaning[10] to maintain that it means one thing when the property is ancestral, and another when it is self-acquired, nay, the *Vīramitrodaya* expressly declares that 'with regard to immovable property, whether self-acquired or inherited from the father or the ancestor, the dependence on the sons is alike etc.'[11] It should not be considered that the acceptance of this position would obliterate all distinction between self-acquired and ancestral immovable property in the hands of the father, for, apart from anything else, the son has a right to call upon the father to come to a partition with regard to the latter property and not with regard to the former.

Let us now turn to the case of ancestral moveables in regard to which the proposition that the father has no right to alienate ancestral property without the consent of the son seems to require qualification. The qualification is founded upon the text declaring that 'the father is master, even of all gems, pearls and corals; but neither the father nor the grandfather is so of the entire immovable property'.[12]

9. Sthāvare tu svārjite pitrādiprāpte ca putrādipāratantryam eva.

10. Sakṛduccāritaḥ śabdaḥ sakṛdarthaṁ gamayati.

11. Sthāvarādau tu svārjite pitrādiparamparāprāpte ca putrādipāratantrayaṁ tulyam eva. *Vyavahāraprakāśa*, p. 419.

12. Maṇimuktāpravālānāṁ sarvasyaiva pitā prabhuḥ/
Sthāvarasya tu sarvasya na pitā na pitāmahaḥ//
Quoted in the *Mit.* Com. on *Yāj.* II. 114.
Dāyabhāga wrongly attributes this to Yājñavalkya. Vide *Dāyabhāga*, II.22.

This seems to indicate that the power of the father over ancestral movables is only limited, as Mr. Colebrooke said, by his own discretion and by a sense of spiritual responsibility ; it has, however, been suggested that since Vijñāneśvara, referring to the father's power of alienating such property says that although property in the paternal as well as grand-paternal (ancestral) estate arises by birth, still the father has an independent power in the disposal of effects other than immovables for necessary acts of duty, and for purposes prescribed by texts of the *Śāstras* such as gifts through affection, support of the family, relief from distress, and so forth',[13] it should be taken that the father has no absolute power of disposing of movables at his own discretion, but only for the purposes, indicated in the above passage. The question is not free from difficulty. It may be said, on the one hand, that this would be putting a narrow construction upon the passage cited from the *Mitākṣarā*, for, the purposes enumerated in that passage are merely illustrative, and they refer, as the passage stands, to self-acquired movables also, in relation to which the father's power of free disposal cannot be possibly gainsaid. Moreover, it may be pointed out that the text does not impose any limitation upon the father's control over movables, and no limitation can possibly be deduced from it ; and the *Vīramitrodaya* in one place says without any qualification that as regards gems, pearls, etc., though inherited from the grandfather, the father alone has independence by reason of the previously cited texts, *viz.*, the father is the master of all the gems, pearls and corals etc. On the other hand, the text of Yājñavalkya that the ownership of father and son is similar in land which was acquired by the grandfather, in a corrody, and in chattels (which belonged to him), and the commentary of the *Mitākṣarā* based on this text that since both (*i.e.*, father and son) have indiscriminately a right in the grand-father's estate the son has a power of

13. Tasmāt paitṛke paitāmahe ca dravye janmanaiva svatvaṁ tathāpi pitur āvaśyakeṣu dharmakṛtyeṣu vācanikeṣu prasādadānakuṭumbabharaṇāpadvimokṣādiṣu ca sthāvaravyatiriktadravyaviniyoge svātantryam iti sthitam. on *Yāj.* II.114.

interdiction created a difficulty in adopting the above view. Under the circumstances the best way of reconciling these conflicting considerations is to hold that the father has the power of alienating ancestral movables at his discretion, but if he begins to dissipate them the son has the right to object on the basis of his co-equal ownership. The explanation of Nīlakaṇṭha that the independence of the father in relation to gems, pearls and corals etc. relates only to 'the wearing and other use of ear-rings etc.,[13a] but does not extend to gift or other alienation' is opposed to the *Mitākṣarā*, and cannot be held to contain a correct exposition of the *Mitākṣarā* view.

The *Dāyabhāga*, however, brushes all these distinctions aside by holding that the father, so long as he is alive, is the absolute owner of all his property whether ancestral or self-acquired, and the son does not acquire any ownership by his birth but only upon the extinction of the father's ownership either by his death or in any other way. The absolute ownership of the father being thus established, it follows on the principles which I have explained in the last lecture, that he can alienate his property at his discretion, and the texts which seem to require the concurrence of the sons or of anybody else in certain cases are all explained as laying down mere moral or religious injunctions. Thus after maintaining that the consent of divided or undivided kinsmen required by the text of Vyāsa in the alienation of immovable property is merely directory and its absence does not invalidate the transaction, Jīmūtavāhana goes on to say "so likewise other texts such as though immovables and bipeds have been acquired by a man himself a gift or sale of them should not be made by him without convening all the sons" must be interpreted in the same manner. For here the words 'should be made' must be understood. Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the

13a. Yat tu, maṇimuktā . ...tad kuṇḍalāṅgulīyakadhāraṇādāv eva pituḥ svātantryamātrārthaṁ, na tu dānādau na vā putrotpatteḥ svatvakāraṇatva-nivṛttyartham. *Vyavahāramayūkha*, p. 91. (Edn. Kane)

gift or transfer is not well ; for a fact cannot be altered by a hundred texts".[14]

To sum up the discussion, we find that according to the *Mitākṣarā* the son, upon his birth, acquires an interest in the property of his father, whether it be ancestral or self-acquired ; with regard to ancestral property, the interest so acquired is so far equal to that of the father, that it entitles him to call upon the father to come to a partition, and with regard to immovable property it gives him the further right to control an alienation by the father without his consent. According to the *Dāyabhāga*, on the other hand, the son does not become co-owner with father during his lifetime, since his ownership arises only upon the extinction of the father's ownership ; he, therefore, cannot compel the father to partition the property with him, and the latter is free to give or sell the property without his consent.

Does the *Dāyabhāga*, then, recognise no interest whatsoever in the son in the father's property before succession opens out to him on the extinction of the father's ownership either upon his demise or otherwise ? It appears that, even according to the *Dāyabhāga*, the father may, at his option, divide his property among himself and his sons, and in doing

14. Na ca.

Sthāvarasya samastasya gotrasādhāraṇasya ca/
Naikaḥ kuryāt krayaṁ dānaṁ parasparamataṁ vinā//
Vibhaktā avibhaktā vā sapiṇḍāḥ sthāvare samāḥ/
Eko hy anīśaḥ ṣarvatra dānādhamanavikraye//

etad Vyāsavacanadvayena ekasya vikrayadānādyanadhikāra iti vācyaṁ, yatheṣṭaviniyogārhatvalakṣaṇasya svatvasya dravyāntara ivātrāpy aviśeṣāt. Vyāsavacanaṁ tu svāmitvena durvṛtta-puruṣagocaravikrayadānādinā kuṭumbavirodhāt adharmabhāgitājñāpanārthaṁ niṣedharūpaṁ na tu vikrayādyanispattyartham. Evañ ca.

Sthāvaraṁ dvipadaṁ caiva yady api svayam arjitaṁ/
Asambhūya sutān sarvān na dānaṁ na ca vikrayaḥ//

ity evam ādikaṁ tad apy evam eva varṇanīyam. Tathā hi kartavyapadam avaśyam atrādhyāhāryam.

Tena dānavikrayakartavyatāniṣedhāt tatkaraṇāt vidhyatikramo bhavati na tu dānādyaniṣpattiḥ, vacanaśatenāpi vastuno'nyathākaraṇāśakteḥ.

Dāyabhāga. Chap II. 27-30.

Jīmūtavāhana in support quotes a text of Nārada, (XIII. 42-43).

so, although he may distribute his self-acquired property in any way he likes, he cannot make an unequal distribution among his sons, of the ancestral immovable property, corrody and slaves, and he cannot also withhold them altogether from the sons by refusing to give them any share whatsoever or by retaining more than a double share for himself. Thus referring to the text of Yājñavalkya, 'The ownership of father and son is similar in land which was aquired by his father, and in a corrody and in chattels',[15] Jīmūtavāhana explains that chattels must mean slaves,[16] and goes on to say that "the meaning of the text may be as set forth by Dhāreśvara, 'a father, occupied in giving allotments at his pleasure, has equal ownership with his sons in the paternal grandfather's estate. He is not privileged to make an unequal distribution of it, at his choice, as

15. Bhūr yā pitāmahopāttā *nibandho dravyam* eva vā/
Tatra syāt sadṛśaṁ svāmyaṁ pituḥ putrasya caiva hi// Yāj. II-121.
Vijñāneśvara explains *nibandha* as :
Nibandhaḥ ekasya parṇabharakasyeyanti parṇāni, tathā ekasya kramukaphalabharasyeyanti kramukaphalānītyādy uktalakṣaṇaḥ.
Dravya : dravyaṁ suvarṇarajatādi.
Jīmūtavāhana explains *nibandha* as : Kārtikyāṁ kārtikyām idaṁ dāsyāmīti yan nibandham. *Dāyabhāga*, II. 13.
Nanda explains : Nibandho nāma ekasyaitaddinam ārabhya iyad annādi asmai deyam iti rājadatto vṛttiviśeṣaḥ. on *Viṣṇusmṛti*, XV II. 2.
Vijñāneśvara explains the meaning of the verse of Yājñavakyla as : Bhūḥ......yat pitāmahmahena pratigrahavijayādinā labdhaṁ tatra pituḥ putrasya ca svāmyaṁ lokasiddham iti kṛtvā vibhāgo'sti. Hi yasmāt tat sadṛśaṁ samānaṁ, tasmān na pitur icchayaiva vibhāgo nāpi pitur bhāgadvayam.
Jīmūtavāhana has his own concept on the interpretation of the verse :
Tasya niravadyavidyodyotena dyotitas tattvatto'yam arthaḥ—yatra dvayor bhrātror jīvatpitṛkayor aprāptābhāgayor ekaḥ putram utpādya vinaṣṭo'nyo jīvati, anantaraṁ pitā mṛtaḥ, tatra putra eva taddhanaṁ prāpnoti atisannikarṣāt tadarthaṁ sadṛśaṁ svāmyaṁ iti vacanam. yathā paitāmahadhane pituḥ svāmyaṁ tathaiva tasmin mṛte tatputrāṇām api, na sannikarṣaviprakarṣābhyāṁ ko'pi viśeṣaḥ pārvaṇavidhinā ṇḍadānena dvayor api tadupakārakatvāviśeṣād ity abhiprāyaḥ.
Dāyabhāga, II. 9.

16. Dravyaṁ bhūsahacaryād dvipadam abhihitam. *Dāyabhāga*, II. 14.

he is in regard to his own acquired wealth.[17] So Viṣṇu[18] says, "when a father separates his sons from himself, his will regulate the division of his own acquired wealth. But, in the estate inherited from the grandfather, the ownership of father and son is equal. This is very clear. When the father separates his son from himself he may, by his own choice, give them greater or less allotments, if the wealth were acquired by himself; but not so, if it were property inherited from the grandfather; because they have an equal right to it. The father has not in such case an unlimited discretion". From these and other passages it is perfectly clear that although Jīmūtavāhana repudiated the theory that property arose from birth, he allowed to the sons at least so much interest in ancestral property as would place a restraint upon the unlimited discretion of the father in distributing that property, if he, at his option, chose to distribute it. Referring to this restraint Mr. Mayne observes that "in the very chapter in which he (Jīmūtavāhana) lays down that the absolute ownership of the father enables him to deal with his ancestral property as he likes, he also lays down that if he chooses to distribute it, he must do so upon the general principles of equity, and cannot even for himself, reserve more than a double share. He affirms for one purpose the very ownership by birth which he denies for another'. It may, perhaps, be going too far to say that the recognition of this restraint upon the father's absolute discretion in distributing ancestral property amounts to the admission of a qualified ownership in the son in respect of such property even during the lifetime of the father, for to speak of owner-

17. Ayaṁ vā Dhāreśvarapuraskṛto vacanārthaḥ; icchayā vibhāgadānapravṛttasya pituḥ paitāmahadhane sadṛśaṁ svāmyaṁ, putraiḥ saha na tatra svopārjitadhana iva nyūnādhikavibhāgam icchātaḥ kartum arhatīti. *Dāyabhāga*, II. 15.

18. Pitā cet putrān vibhajet tasya svecchā svayam upātte'rthe pitāputrayos tulyaṁ svāmitvam. *Viṣṇusmṛti*, XII. 1-2.

Jīmūtavāhana explains: Idaṁ suvyaktaṁ, yadi pitā putrān vibhajati tadā svopātte'rthe nyūnādhikavibhāgaṁ svecchayā putrebhyo dadyāt. paitāmahe tu naitat yasmāt tatra tulyaṁ svāmitvaṁ, na punaḥ pituḥ svacchandavṛttitā. *Dāyabhāga*, II. 17.

Vide here the commentary of Nandapaṇḍita on the *Viṣṇusmṛti* XVII. 1-2.

ship without the least *right* of enjoying the usufruct except at the option of another may seem to involve a contradiction in terms. It may, however, be said without any impropriety that the limits imposed upon the absolute discretion of the father in distributing the ancestral property in any way he likes to the prejudice of the sons show that the *Dāyabhāga* admitted that they had an interest in that class of father's property even during his life time which might be of importance under certain contingencies. The position thus accorded to the sons may be compared to that of *sui heredes* under the Roman Law; they were children and grand-children in the power of the deceased who on his death became *sui juris*, and with regard to them, it is stated in the *Institutes of Justinian*, that they are *sui heredes* "because they are family heirs, and even in the lifetime of their father, are considered owners of the inheritance in a certain degree".[19] It may also be remarked that just as under the Roman Law grand-children cannot be regarded as *sui heredes* unless their father had ceased to be *suus heres*, in the life time of his father, having been either cut off by death, or otherwise freed from paternal authority, so under the *Dāyabhāga* law also, the grand-sons cannot claim to share the inheritance with their uncles unless their father has died or otherwise become incapable of inheriting during the lifetime of his father. Resemblances like these are so startling and there are so many of them to be found in almost all the different branches of jurisprudence that one often wonders how they came about, unless the ancestors of the two people (the Romans and the Hindus) had at one time, inhabited the same country and been governed by the same institutions which they carried with them in their migration to shape the further development of their legal ideas. Comparative Jurisprudence, when properly studied, thus supports the conclusions of comparative Philology, and it is because the Hindu Jurisprudence has not been studied with that amount of care which has been bestowed upon the study of Sanskrit language, that we do not as yet possess sufficient materials to guide our researches and help us in our conclusions.

19. Institutes *Lib*, II. *Tit*. P. XIX. 2.

I will now turn to the next great distinction between the *Mitākṣarā* and the *Dāyabhāga* Schools. This relates to the devolution of property on the death of a member of a joint family. According to the *Dāyabhāga* the position of a deceased owner as the member of a joint family does not make any difference whatsoever for the purposes of succession to the property left by him as a part of the joint family property; the person who is entitled to succeed will be determined in the usual way, and as regards that it would have made no difference if instead of being a member of an undivided joint family he had been separated form his co-parceners before his dea.h. The *Mitākṣarā* law, however, proceeds upon entirely different principles. According to that system to quote the words of Mr. Mayne, 'there is no such thing as succession, properly so called, in an undivided family. The whole body of such a family, consisting of males and females, constitutes a sort of corporation, some of the members of which are co-parceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. In Malabar and Canara, where partition is not allowed, the idea of heirship would never present itself to the mind of any member of the family. Each person is simply entitled to reside and be maintained in the family house, and to enjoy that amount of affluence and consideration which arises from his belonging to a family possessed of greater or less wealth. As he dies his claims cease, and as others are born, their claims arise. But the claims of each spring from the mere fact of their entrance into the family, not from their taking the place of any particular individual. Deaths may enlarge the beneficial interest of the survivors, by diminishing the number who have a claim upon the common fund, just as birth may diminish their interests by increasing the number of claimants. But although the fact that A as the child of B introduces him into the family, it does not give him any definite share in the property, for B himself has none. Nor upon the death of B does he succeed to anything, for B has left nothing behind him to succeed to. Now in every part of India where the *Mitākṣarā* prevails the position of an undivided family is

exactly the same, except that within certain limits each male member has a right to claim a partition, if he likes. But until they elect to do so, the property continues to devolve upon the members of the family for the time being by survivorship and not by succession. The position of any particular person as son, grandson, or the like, or one of many sons or grandsons, will be very important when the time for partition arrives, because it will determine the share to which he is then entitled. But until that time arrives he can never say—I am entitled to such a definite portion of the property ; because the next year the proportion in which he would have a right to claim on a division might be much smaller, and the year after much larger, as births or deaths supervene'.[20] The above extract contains a clear exposition of the devolution of joint family property under the *Mitākṣarā* Law upon the death of one of its members. The difference between the *Dāyabhāga* and the *Mitākṣarā* on this question being thus understood, let us see how far it can be deduced as the logical result of the corresponding difference between the *Dāyabhāga* and the *Mitākṣarā* conceptions of co-ownership in undivided property. This difference will be made evident from a comparision of the definitions of partition or severence of co-ownership (*vibhāga*) as given in the *Dāyabhāga* and *Mitākṣarā* respectively. The *Dāyabhāga* defines partition in the following manner : "Partition consists in manifesting (or in particularising) by the casting of lots or otherwise a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed. Or partition is a special ascertainment of property, or making of it known (as inhering in a particular share with reference to a particular person)".[21]

20. Mayne, Hindu Law, p. 333.

21. Jīmūtavāhana after critically analysing different meanings of the term *vibhāga*, has taken up the definition of *vibhāga* by *Mitākṣarā* without of course, mentioning by name. Thus he argues in the following way :

Nanu kiṁ dāyasya vibhāgo vibhaktāvayavatvaṁ yad vā dāyena saha vibhāgo' saṁyuktatvaṁ na tāvat pūrvaḥ dāyavināśāpatteḥ, nāpi

The *Mitākṣarā*, on the other hand, says that "Partition (or severence of co-ownership) is the adjustment of diverse rights regarding the whole, by distributing them or particular portions of the aggregate."[22] The difference between the two views, therefore, consists in this : according to the *Dāyabhāga*, each of the undivided co-parceners has ownership, not over the entire joint property, but only over particular portions thereof which becomes manifest when upon partition these several portions are specifically allotted to the several co-parceners so that at no time does the ownership of one among several co-parceners extends over the whole of the joint property, but it always extends over a part, unascertained and undefined before partition and ascertained and particularised after it. This doctrine is therefore known as *prādeśika-svatvavāda* or the doctrine of ownership in part. According to *Mitākṣarā*, on the other hand, the ownership of each co-parcener in an undivided family extends over the whole of the joint property, and each part thereof, although to borrow the words of Lord Westbury in Appovier's Case, 'no individual member of that family, while it remains undivided can predicate of of the joint and undivided property that he, that particular member, has a certain definite share'.[23] The result is that

dvitīyaḥ saṁyukte'pi na mamedaṁ vibhaktaṁ svaṁ bhrātur idam iti prayogāt.

Na ca sambandhāviśeṣāt sarveṣāṁ sarvadhanotpannasya svatvasya dravyaviśeṣe vyavasthāpanaṁ vibhāga iti vākyaṁ, sambandhyantarasadbhāvapratipakṣasya sambandhasyāvayaveṣv eva vibhāgavyaṅgyasvatvāpādakatvāt kṛtsnapitṛdhanagatasvatvotpādavināśakalpanāgauravāt yatheṣṭaviniyogaphalābhāvenānupayogāc ca. *Dāyabhāga*, 1. 6-7.

He himself presents his own definition thus :

Ekadeśopāttasyaiva bhūhiraṇyādāv utpannasya svatvasya vinigamanāpramāṇābhāvena vaiśeṣikavyavahārānarhatayā avyavasthitasya guṭikāpātādinā vyañjanaṁ vibhāgaḥ. viśeṣeṇa bhajanaṁ svatvajñāpanaṁ vā vibhāgaḥ. *Dāyabhāga*, 1.8.

For other details regarding *vibhāga* as interpreted both by Vijñāneśvara and Jīmūtavāhana vide the explanatory notes on the section in the *Dāyabhāga* Ed. by H. Chatterji.

22. Vibhāgo nāma dravyasamudāyaviṣayāṇām anekasvāmyānāṁ tadekadeśeṣu vyavasthāpanam. *Mit.* on *Yāj.* II. 114.

23. Appovier vs. Ram Subba Aiyar 11. Moo. I. A. 89.

each co-owner is deemed to be the owner of the whole, in the same manner as other co-owners are also owners of the whole, the ownership of the one without excluding the co-ownership of the others. This view is known as *sāmudayika-svatvavāda* or the doctrine of ownership in the whole.

The difference between the conceptions of ownership indicated above, has sometimes been expressed by saying that a *Dāyabhāga* co-parcener holds the property in quasi-severalty as if he were a tenant in common, whereas a *Mitākṣarā* co-parcener holds the entire property and every part of it as if he were a joint tenant. It is unnecessary to pause and consider how far these descriptions are strictly accurate, for the analogies, so far as they go, are not likely to be misleading. What I am at present concerned with is to consider how far the difference between the *Dāyabhāga* and the *Mitākṣarā* as regards the devolution of joint property upon the demise of one of the co-owners can be said to be a legitimate deduction from the difference in the conception of co-ownership explained above. Giving the matter my best consideration I am inclined to think that although it cannot be said that the doctrine of survivorship is necessarily bound up with the peculiar conception of co-ownership maintained by the *Mitākṣarā* School in as much as that conception is not necessarily inconsistent with the course of succession laid down by the *Dāyabhāga*, yet it must be admitted that there is a very close affinity between the *Mitākṣarā* conception of co-ownership and the doctrine of survivorship as well as between the *Dāyabhāga* conceptions of co-ownership and the devolution of property by succession. The reasons why I say so are these : you will remember that according to the *Mitākṣarā* conception of co-ownership each undivided co-parcener is the owner of the whole joint property. So that if one of them dies out while others remain, it does not create, if I may use the expression, a void to be filled up by a successor ; the surviving co-parceners were from before the owners of the entire property, and no change is created by the death beyond the disappearance of a co-owner, who, when alive, was entitled to be maintained out of the family funds and to claim a share on

partition. The doctrine of survivorship therefore, readily chimes in with a conception of co-ownership of this description. And I may almost say that it is incompatible with the conception of co-ownership as explained in the *Dāyabhāga*, for if the co-owners held the property in quasi-severalty, the most natural consequence would be that one of them being dead he would be followed by a successor as heir, would step into his shoes and occupy the same position as he did and if by a coincidence another co-owner becomes entitled to the inheritance he would come in as a successor and not as a survivor. The natural transition from the conception of co-ownership to the course of devolution laid down in each school is therefore abundantly clear; still I cannot say that the transition, though natural, is absolutely necessary, and my reasons are these. You are aware that Raghunandana, the author of *Dāyatattva*, is one of the most celebrated exponents of the *Dāyabhāga* doctrine. Similarly, Nīlakaṇṭha, the author of *Vyāvahāramayūkha*, is in the main a follower of the *Mitākṣarā* School. Yet, although they do not depart from the course of devolution laid down by the leading authorities of the School to which they belong, they do differ from their masters as regards the conception of the interest of a co-parcener in an undivided family, for in this point Raghunandana controverts the position of Jīmūtavāhana while Nīlakaṇṭha supports the same. Thus referring to the *Dāyabhāga* definitions of partition Raghunandana objects that 'the definition is not accurate for how may it be certainly known since no text declares it, that the lot for each person, falls precisely on the article which was already his?' and gives his own definition of partition as 'a distributive adjustment, by lot or otherwise, of the property of relatives vested in them over the whole wealth, in right of the same relation, upon the extinction of the former owner's property.'[24] Śrīkṛṣṇa Tarkālaṅkāra also, after making a faint

24. Yatrāsya svatvaṁ tatraiva guṭikāpāta iti kathaṁ vācanābhāvān niścetavyaḥ. yatra vā pitur nidhanānantaraṁ tādīyāśvayor ekataram ādāya bhrātrā yad arjitaṁ tatrārjitadhane'rjakasya dvāv aṁśau aparasyaiko'ṁśaḥ sarvasammataḥ. Tatra yadi prācīnadhanavibhāge guṭikāpātādinā paścād arjkena śo'śvo labdhas tadā prādeśikasvat-

attempt to repel the objections of Raghunandana, proceeds to observe without any comment that Harinātha, Vijñāneśvara, Vācaspati Miśra and their followers controvert the doctrine of *Dāyabhāga* and summarise their reasons for doing so,[25] and hence Jagannātha has inferred that Raghunandana's opinion is indirectly admitted even by Śrīkṛṣṇa. On the other hand Nīlakaṇṭha observes that the prior undefined ownership of many brothers, etc., is defined (and made known) by partition. According to some, by the extinction of prior joint ownership extending over the whole property, a particular ownership is created in portions of it ; but, the idea of extinction of a prior ownership and the creation of a new one, involves (the logical

vādimate prāgapy arjakasyaiva so'śva iti tenārjitadhane kathaṁ bhrātrantarasya bhāgaḥ. Yadi cārjaketareṇa so'śvo labdhas tadā tenārjitadhanasya samabhāgo yuktaḥ ekasya svāyāsena aparasyāśvāyāsenārjitatvāt.

Raghunandana defines *vibhāga* in his own way combining the two elements—*uparamasvatvavāda* of Jīmūtavāhana and *sāmudāyikasvatvavāda* of Vijñāneśvara :

Vastutas tu pūrvasvāmisvatvoparame sambandhāviśeṣāt sambandhināṁ sarvadhanaprasūtasvatvasya guṭikāpātādinā prādeśikasvatvavyavasthāpanaṁ vibhāgaḥ.

In support he observes : Evaṁ kṛtsnadhanagatasvatvotpādavināśāv api kalpyete saṁsṛṣṭatāyāṁ prādeśikasvatvanāśakṛtsnadhanagatasvatvotpādāv iva. *Dāyatattva* p. 5.

On the basis of the text of Vyāsa Raghunandana explains : Vyāsaḥ ;

Sthāvarasya samastasya gotrasādhāraṇasya ca/

Naikaḥ kuryāt krayaṁ dānaṁ parasparamataṁ vinā//

Atra samastasyeti viśeṣaṇena kṛtsnadhanaviṣayakam eva pratyekasvatvam pratīyate. Tasmāt tulyasambandhyantarasvatve sambandhisakāśāt saṁkrāntadhanaṁ tasyāpi mamāpīti sambandhinā pratīyate. Tadvimatau svārthaṁ dānādikaṁ. pratiṣiddham. Ato na tv ekadeśagatasvatvam iti siddham. *Ibid* p. 7.

25. Yac cātra *Smārtena* dūṣaṇan abhihitam............tad asat, prādeśikasvatvavādimate avibhaktasyaiva sādhāraṇapadārthatvād iti sāmānyasvatvānabhyupagamenānyavidhasyāsambhavāt, atas taduktadoṣāsambhavād iti sūdhībhir bhāvyam.

Atra *Harinātha-Mitākṣarā-Vācaspatimiśrānuyāyinaḥ* yatra yasya svatvaṁ tatraiva tasya guṭikāpāta ity atra pramāṇābhāvāt durvibhaktatvena punar guṭikāpātavisaṁvādāc ca. Kiñ ca ekakṣetrotpannaśasyānāṁ yatrāṁśakrameṇa grahaṇaṁ tatra kimavacchedena svatvaṁ jāyate, na śasyāvacchedena śasyānāṁ tadānīm ajātatvāt. kiñ ca ekena gavā

fault of) cumbrousness; (it is better, therefore, to conclude) that the particular ownership which was created in a portion was (only) made known by partition as inhering in a particular thing. You will understand that I am not here concerned to consider the logical merit of these conflicting opinions, for the conclusion which I wish to deduce from their existence is, as I have already indicated, that although the doctrine of survivorship flows naturally from the *Mitākṣarā* conception of co-ownership, it is not impossible for a supporter of the *Dāyabhāga* succession to adopt that conception, and that one who adopts the *Dāyabhāga* conception of co-ownership may also on the basis of specific authority, acknowledge the line of devolution pointed by the *Mitākṣarā* in the case of the demise of a co-parcener of an undivided family. It cannot, however, be gainsaid that in the fitness of things the *Mitākṣarā* conception of co-ownership in an undivided family paves the ground, if I may use the expression, for the doctrine of survivorship, while the *Dāyabhāga* conception is naturally antagonistic to it.

The next question that I propose to discuss is the power of alienation of joint property by an undivided co-parcener. You may anticipate from the difference that I have pointed out between the *Mitākṣarā* and the *Dāyabhāga* conceptions of co-parcenary property, that the power of an undivided co-parcener in a *Mitākṣarā* family to alienate joint family property is not likely to be the same as that of an undivided co-parcener in a *Dāyabhāga* family. So long as the family continues joint no *Mitākṣarā* co-parcener can say that he has got a definite

kṛṣṭabhūmyāder yatra śasyavibhāgas tatra kimavacchenhedena gavi svatvam? Śasyāvacchedeneti cen na, śasyādes tadasambhavāt. Na hy asambandho'py avacchedakaḥ. kiñ ca sambandhasāmyāt sarveṣāṁ sarvatra svatvotpattau bādhakābhāvāt prāgabhāvādṛṣṭādīnāṁ viśeṣya hetutvābhāvāt sambandhyantarasattāyāḥ pratibandhakatve gauravāt. Na ca sāmānyasvatvotpattivināśakalpanāgauravaṁ prāmāṇikatvāt, ekasyāṁ dāsyāṁ daśānāṁ svatve tridināt paraṁ svatvanāśatadutpattikalpanāyāṁ viparītagauravāc ca vibhāgasya svatvanāśakatvaṁ taddhetutvañ ca pitṛkṛta vibhāge kḷptam ity āhuḥ.

Śrīkṛṣṇa's com. on *Dāyabhāga*, 1-10.

For a discusson on this point vide, Harendra Candra Smṛtitīrtha *Svatvavādapraveśaka*. (Calcutta, 1965), pp. 37-39.

share in the joint property. It is true that he has got an interest in the whole of the joint property, but his interest is limited by the co-equal interest of the other co-parceners. That being so, it follows that one co-parcener cannot alienate either the whole or any portion of the joint property without infringing the rights of the other co-parceners, for there is not a single item of property in which one co-parcener can claim title to the exclusion of the others. Therefore, according to the strict *Mitākṣarā* doctrine an undivided co-parcener has no right to alienate any portion of the joint property without the concurrence of the others, and if he does, it will be invalid in toto, for the alienor cannot say that he has got a definite share to the extent of which the alienation may hold good, although it may be invalid as to the rest. Thus in the chapter dealing with the rescission of gifts, the *Mitākṣarā* lays down that joint property has been declared unfit to be given in the same way as pledges, trusts, deposits, etc., on the ground that it is not the property of the donor, meaning thereby that the donor has not got absolute dominion over it,[26] and it will follow from the principles explained by me in the last lecture that an alienation of such property must be treated as invalid. The matter is also made quite clear where the *Mitākṣarā* referring to the text 'separated kinsmen as those who are unseparated are equal in respect of immovables' goes on to explain that 'among unseparated kinsmen the consent of all is indispensably requisite, because no one is fully empowered to make an alienation since the estate is common ; but among separated kindred the consent of all tends to the facility of the transaction, by obviating any future doubt whether they be separate or reunited ; it is not required on account of any want of sufficient power in the single owner ; and the transaction is consequently valid even without the consent of the separated kinsmen' ;[27] and commenting upon

26. Svaṁ dadyād ity anena cāsvabhūtanām anvāhitāyācitakādhāsādhāraṇanikṣehāṇāṁ pañ ānām adeyatvam vyatirekato darśitam.

Mit. on *Yāj*, II. 175.

27. Yat tu vacanam,
vibhaktā' vibhaktā vā sapiṇḍāḥ sthāvare samāḥ | Eko hy anīśaḥ sarvatra dānādhamanavikraye// iti tad apy avibhaktaeṣu

the same text the *Vīramitrodaya* observes that 'although the incompetency without the consent of the others, is settled by reason of the co-equality of ownership, in joint property of undivided co-parceners, still the same is here particularly mentioned in respect of immovable property for the purpose of extolling its worth ; but as regards the separated co-perceners what is said in this text is for the purpose of facility of proof in case of dispute.' The position is, therefore, fully established that an alienation by an undivided co-parcener without the consent of other co-parceners is not valid. To this limitation upon the power of a single co-parcener there is an exception based upon the text 'even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family, and specially for pious purposes,' which is explained by the *Mitākṣarā* to mean that 'while the sons and grandsons and minors are incapable of giving their consent to a gift and the like or while brothers are so and continue unseparated ; even one person who is capable, may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family requires it, or the support of the family renders it necessary or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.[28]

What has been stated above represents the strict *Mitākṣarā* Law, but our courts have departed from it to various extents principally on equitable considerations although all the High Courts have not proceeded to the same extent. On such

dravyasya madhyasthatvād ekasyānīśvaratvāt sarvābhyanujñayāvaśyaṁ kāryā. Vibhaktaesu tūttarakālaṁ vibhaktāvibhaktasaṁśayavyudāsena vyavahārasaukaryāya sarvābhyanujñā na punar ekasyānīśvaratvena. Ato vibhaktānumativyatirekeṇāpi vyavahāraḥ siddhyaty eveti vyākhyeyam. *Mit.* on *Yāj.* II-114.

28. Eko'pi sthavare kuryād dānādhamanavikrayam/
Āpat kāle kuṭunbārthe dharmārthe ca viśeṣataḥ//
Asyārthaḥ, Aprāptavyavahāreṣn putresu pautreṣu vānujñādānādāv asamartheṣu bhrāṭṛṣū vā tathāvidheṣv avibhakteṣu sakalakuṭumba vyāpanyām āpadi tatpoṣane vāvaśyaṁ kartavyīṣu ca pitṛśrāddhādiṣu sthāvarasya dānādhamanavikrayam eko'pi samarthaḥ kuryat.
Mit on *Yāj.* II. 114.

considerations, all the High Courts have held that the interest of an undivided co-parcener may be seized and sold in execution of a decree, obtained against him and the purchaser may enforce his right by coming to a partition and obtaining definite properties to the exclusion of the other co-paceners. As regards the position of an alienee for valuable consideration, where the purchase was made without the aid of the Court, all the Courts are not similarly agreed. Thus the Bombay and Madras High Courts have held that an alienation for valuable consideration should be held valid to the extent of the share which the alienor would have received on partition, so that the alienee may sue for partition, and thus obtain possession of the share to which he had become entitled by his purchase. On the other hand the Calcutta and the Allahabad High Courts seem to stick to the strict doctrine of the *Mitākṣarā* Law and maintain that a voluntary alienation of joint property by an undivided co-parcener whether for valuable consideration or not is invalid, but even there, in some cases, the Court, in setting aside the alienation, has enforced the equities in favour of the alienee in such a manner as to bring about exactly the same result as is worked out by the Bombay and Madras doctrine. As regards alienations without consideration all the Courts seem to be agreed that an undivided co-parcener cannot dispose of the joint property even to the extent of the share which he would receive on partition, and as the alienee being a volunteer, cannot put forward any equitable considerations, no indulgence should be shown to him. It is not within the province of these lectures to discuss the various decisions in so far as they are based upon principles extraneous to the Hindu Law, and I may point out that it has been acknowledged by their Lordships of the Judicial Committee in the case of *Suraj Bunsi Koer* v. *Sheopersad Singh*[29] that 'there can be little doubt that all such alienations, whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family ; and the law as established in in Madras and Bombay has been one of gradual growth,

29. I.L.R. 5. Cal. 148 (166).

founded upon the equity which a purchase for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition and these observations have been repeated by them in the subsequent case of *Laksman Dada Naik* v. *Ramchandra Dada Naik.*[30] I may, however, observe that it is somewhat difficult to understand how a person, who knowingly purchases a property inalienable under the law, can have much reason to complain when he finds that he cannot reap any benefit under it and the difficulty of allowing him any relief on strict principles of the Hindu law becomes almost insuperable when it is remembered that Manu[31] declares that "he who gives property declared unfit to be given and he who receives it are both liable to punishment as if they were thieves", and a purchase, with full knowledge of the circumstances, is as much within the reason of the condemnation as the acceptance of a gift. Our Courts have, however, thought fit to hold otherwise, and thus lent a helping hand to diverse influences already at work in undermining the integrity of a joint family under the *Mitākṣarā* Law.

The position of an undivided co-parcener under the *Dāyabhāga* is, as already explained,somewhat different, for his interest, according to the peculiar doctrine of Jīmūtavāhana, does not extend over the whole joint property but only over a part which is only defined and made manifest by a subsequent partition. Therefore, it is possible for a *Dāyabhāga* co-parcener to say, even before partition, that he has got a definite share in the joint property although it cannot be allocated before a partition actually takes place. This being the *Dāyabhāga* conception of co-ownership in an undivided family it follows that it is open to a *Dāyabhāga* co-parcener to transfer his own share in the joint property, and such a transfer will be valid even without the concurrence of the other co-parceners who cannot legitimately interdict an alienation of what is not their own. Thus Jīmūtavāhana expressly says that 'It should not be alleged

30. I. L. 4. R. 5 Bom. 61 S.C. 7 I.A. 181.

31. Adeyaṁ yaś ca gṛhṇāti yaś cādeyam prayacchati/
Tāv ubhav cauravac chāsyau dāpyau cottamasāhasam//
Vīramitrodaya wrongly attributes this to Manu. P. 307.

that by the text of Vyāsa (A simple co-parcener may not without the consent of the rest, make a sale or gift of the whole immovable estate, nor of what is common to the family. Separated kinsmen, as those who are unseparated are equal in respect of immovables for one has not power over the whole, to give, mortgage or sell it) one person has no power to make a sale or other transfer of such property. For here also (in the very instance of land held in common) as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure. But the texts of Vyāsa, exhibiting a prohibition are intended to show a moral offence, since the family is distressed by a sale, gift or other transfer which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer.[32] The position of the *Dāyabhāga* upon this point is clearly explained by Śrīkṛṣṇa Tarkālaṅkāra in the chapter of the *Dāyakramasaṁgraha* headed 'the discussion whether common property is or is not fit to be given by one'. In this chapter he first of all points out that there are certain lawyers who contend that one co-parcener has no right to dispose of any portion of the joint property and then explains that this view is founded upon the doctrine of co-equal right in the whole according to which all co-parceners have property in the entire property and hence a gift, a sale or any other sort of transfer made by one would be invalid. But says he, 'this cannot be correct since the author of *Dāyabhāga* has refuted the doctrine of co-equal right in the whole for want of sufficient basis.[33]

32. Na ca.
Sthāvarasya samastasya gotrasādhāraṇasya ca/
Naikaḥ kuryāt krayaṁ dānaṁ parasparamataṁ vinā//
Vibhaktā avibhaktā vā sapiṇḍāḥ sthāvare samāḥ/
Eko hy anaśīḥ sarvatra dānādhamanavikraye//
etadvyāsavacanadvayena ekasya vikrayadānādyadhikāra iti vācyam. Yatheṣṭaviniyogārhtvalakṣaṇasya svatvasya dravyāntare ivātrāpy aviśeṣāt. Vyāsavacanan tu svāmitvena durvṛttapuruṣagocaravikrayadānādinā kuṭumbavirodhāt adharmabhāgitājñāpanārthaṁ niṣedharūpaṁ na tu vikrayadānādyanispattyartham. *Dāyabhāga*. II. 27-28.

33. ...Tad asat, sāmānyasvatvasya dāyabhāgakṛtaiva pramāṇābhāvena nirākṛtatvāt. *Dāyādhikārakramasaṅgraha*. P. 57. (Calcutta. 1828).

Hence the author of *Dāyabhāga* after quoting the text of Vyāsa and raising the dispute on the authority of that text that one has no right to make a gift or sale etc., resolves that dispute by maintaining that even here (*i.e.* in the case of common property) property which consists in the fitness of free disposal exists just as well as in the case of other goods, so that the text (of Vyāsa) merely exhibits a prohibition for the purpose of indicating a moral offence, since the family is distressed by a sale which argues a disposition in the person to make an ill use of his power as owner, but is not meant to invalidate the sale or other transfer. Since there is nothing like common property in the sense that it is common to several owners, such a thing being unreal, commonness means no more than undividedness, and, therefore, in as much as property exists in the so-called common property even before partition, there is nothing to hinder a person from giving or otherwise transferring his own share, and this is the intention of the author of the *Dāyabhāga* who maintains the doctrine of property in parts.[34] The whole of this discussion furnishes a striking specimen of the way in which the peculiar doctrine of *Dāyabhāga* School concerning the conception of co-ownership in an undivided property is carried to its logical consequence, and the basis of the difference regarding the right of alienation of an undivided co-parcener between the *Dāyabhāga* and the *Mitākṣarā* Schools is clearly explained. It shows that the decision of the question really hinges upon the existence or non-existence of full dominion over the property to be transferred, and where it exists no amount of prohibition in the *Śāstras* can invalidate the transfer since as Jīmūtavāhana asserts that 'a fact cannot be altered by a hundred texts'—a dictum which is not a peculiar text of the *Dāybhāga* School, but is a recognised principle of Hindu Jurisprudence founded upon strict logic and good sense and practically adopted by the

34. Sāmānyasvatvābhāvena sādhāraṇatvasya nānāsvāmikatvarūpasyālīkatayā sādhāraṇatvam avibhaktatvam eva, tatra ca sādhāraṇe svatvasya vibhāgāt prāg eva jātatvena tadānīm api svāṁśadānādau bādhakābhāva iti prādeśikasvatvavādino dāyabhāgakartur āśayaḥ.
Ibid. p. 58.

Mitākṣarā in dealing with the requirement of the consent of divided kinsmen and the like.

Having thus shown that according to the *Dāyabhāga* School an undivided co-parcener can alienate his own share in the joint property, we are called upon to consider how far he can alienate the entire joint family property or one entire undivided property out of the joint family property. Now in dealing with the question we can at once say that such a transaction cannot be entirely valid since no one can transfer what was not his own. This follows from the general principles already explained by me and is also confirmed by the following passage in the *Dāyabhāga* : "Donation is complete then only when the owner, conscious that the thing is his, relinquishes it with a view to its becoming the property of another person, and that other person is sensible of the property apprehending 'this is become mine' ; but that cannot occur in respect to common goods, and therefore common property is pronounced unfit to be given'.[35] It must be understood that the above criticism applies to an attempted alienation of the entire joint property since an individual co-parcener cannot possibly deal with it as his own, and also of one entire property since it can be ascertained before a partition actually takes place that it will be allotted to the share of the alienor. Hence, in such a case, it is impossible for the alienee to be conscious that the property sought to be transferred is his to the exclusion of the other co-parceners, and the alienee also cannot appropriate it with the consciousness that it is become his simply by the act of the alienor without the concurrence of those co-parceners. The conclusion, therefore, is that such an alienation cannot be valid as it stands and the only question that remains to be considered is whether some effect should not be given to it by holding it effectual to the extent of share of the alienor. Jagannātha in his Digest[36] *Vivādabhangārṇava* quotes the

35. Yad eva hi mamedam iti viśeṣaṁ jānānaḥ parasvatvāpattaye svāmī tyajati paraś ca viśeṣeṇedaṁ mameti pratyeti tatraiva dānanispattiḥ. Na ca sādhāranadhane tathā sambhavatīti sādhāraṇadhanam adeyam uktam. *Dāyabhāga,* XIII. 8.

36. Colebrooke's Digest, vol. II. P. 58.

opinion of Vācaspati Bhaṭṭācārya to the effect that if the whole of the joint property be sold by one of the parceners, the sale is not valid so far as regards the shares of the other parceners, but is valid so far as regards the seller's own share, and he says that this opinion may be admitted upon the reason of the law.

Turning next to the question of succession proper the most noticeable distinction between the *Mitākṣarā* and the *Dāyabhāga* Schools relates to the position of cognates in the order of succession. According to the *Mitākṣarā*, all agnates, i.e. relations who trace their connection exclusively through males are entitled to inherit in preference to cognates or relations through a female, with the only exception of a daughter's son, who although a cognate, occupies a very high position in the order of succession coming just after the daughter and before the parents. It may also be remarked that the peculiar favour shown to a daughter's son has been considered to be a somewhatc later introduction. If we look to the *Dharmaśāstrās* we find that the peculiar position of a daughter's son is not recognised by all, and even in the text of Yājñavalkya enumerating the heirs of a man dying without a male issue he is not specially mentioned, so that Vijñāneśvara is constrained to fall back upon the particle (*ca*) and argue that by the import of the particle 'also' (*ca*) the daughter's son succeeds to the estate on failure of daughter'.[37] Among the commentators also Aparārka does not accord any special position to a daughter's son, so that he can only come in as a *bandhu* after all the agnates, however remote, are exhausted. Mr. Mayne, therefore, suggests that the explanation for the peculiar favour shown to a daughter's son is to be found in the old practice of appointing a daughter to raise up issue for a man who had none. The daughter so appointed was herself

37. 'Caśabdād duhitrabhāve dauhitro dhanabhāk, Com. on *Yāj.* II, 135-6. In support Vijñāneśvara quotes the texts of Viṣṇu :

Aputrapautrasantāne dauhitrā dhanam āpnuyuḥ/
Pūrveṣāṁ tu svadhākāre pautrā dauhitrikā matāḥ//

and *Manu* : *IX.* 136.

Akṛtā vā kṛtā vāpi yaṁ vindet sadṛśaṁ sutam/
Pautrā mātāmahas tena dadyāt piṇḍaṁ hared dhanam//

considered as equal to a son. Naturally her son was equivalent to a grandson, and as the merits of a son and grandson are equal, he ranked as a son. Consequently, we find him enumerated among the subsidiary son, and taking a very high rank among them, generally second or third. Subsequently the appointment of a daughter to raise up issue for the father became obsolete, but the fact of the nearness of daughter and daughter's son remained, and their natural claim to succession on the ground of mere consanguinity recommended itself for general acceptance".[38] The explanation is very plausible and, in all probability furnishes a correct account of the way in which the exceptional position came to be accorded to a daughter's son ; but however that may be, it is certain that with this single exception no cognate can ever succeed in preference to an agnate to the property of his deceased relation. Jīmūtavāhana, however, does not recognise the rule that agnates must always succeed in preference to cognates, and settles the order of succession by the application of a new principle, *viz* ; the principle of spiritual benefit. The result of the application of this prtnciple is that apart from a daughter's son who has a peculiar position accorded to him by specific texts in the *Dharmaśāstras*, other cognates are, to borrow Mr. Mayne's expression, 'sifted in and out among the agnates, heirs in the famale line frequently taking place before very near *sapiṇḍas* in the direct male line, on the principle of of superior religious efficacy'.[39] This result is attained mainly on the interpretation which Jīmūtavāhana puts upon two texts of Manu which run as follows : 'to three must libation of water be made, to three must offerings of food (*piṇḍa*) be presented, the fourth in descent is the giver, but the fifth has no concern with them : To the nearest *sapiṇḍa* the inheritance belongs ; after that the distant kinsman (*sakulya*) shall be the heir, or the Vedic preceptor or the pupil'.[40] Relying on these

38. Mayne, Hindu Law, p. 764.
39. Mayne, Hindu Law, p. 689.
40. Trayāṇām udakaṁ kāryaṁ triṣu piṇḍaḥ pravartate/
Caturthaḥ sampradātaiṣāṁ pañcamo nopapadyate// *Manu*, IX 186.
Anantaraḥ sapiṇḍād yas tasya tasya dhanaṁ bhavet/
Ataūrdhvaṁ sakulyaḥ syād ācāryaḥ siṣya eva vā// *Manu*, IX. 187.

texts, Jīmūtavāhana argues that in as much as at the time of the *Pārvaṇa Śrāddha* a person presents funeral cakes not only to his three paternal ancestors, but also to his three maternal ancestors, therefore, in addition to the agnetic *sapiṇḍas* a person may also have certain cognatic *sapiṇḍas* being allied with them by the presentation of a common funeral cake, and these *sapiṇḍas*, although cognates, will succeed in preference to to *sakulyas* including agnates beyond three degrees according to the Hindu mode of computation and some of them, *viz.*, the daughter's sons of the three paternal ancestors will, on the analogy of the succession of one's own daughter's son, succeed even in preference to some agnatic *sapiṇḍas* the father's daughter's son succeeding before the paternal grandfather and the rest, and so on. Thus after laying down that 'on failure of the descendents of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son in like manner as it descends to the owner's daughter's son' and that 'the succeesion of the grand-father's and great-grandfather's lineal descendant including the daughter's son must be understood in a similar manner according to the proximity of the funeral offering, since the reasons stated in the text 'for even the son of a daughter delivers him in the next world like the son of a son' is equally applicable and the daughter's sons of his father and the rest transport his manes over the abyss by offering oblations in which he may participate'[41], Jīmūtavāhana goes on to observe that on failure of these persons since the maternal uncle and the rest present oblations to these maternal ancestors of the deceased beginning with his maternal grandfather which the deceased himself was bound to offer, therefore the property should devolve on the maternal uncle and the rest, for it is by means of wealth that a person may become giver of

41. Evaṁ pitāmahaprapitāmahasantater api dauhitrāntāyāḥ piṇḍapratyāsattikrameṇādhikāro boddhavyaḥ, dauhitro'pi hy amutrainaṁ santārayati pautravad (Manu, IX. 139) iti hetor aviśeṣāt svadauhitravat pitrādidauhitrasyāpi tadbhogyapiṇḍadānena santārakatvāt.

Dāyabhāga. 11. 6. 9.

oblations[42] and he ultimately sums up the discussion by saying that a kinsman whether sprung from the family of the deceased though of different male descent as his own daughter's son or his father's daughter's son or sprung from a different family as his maternal uncle or the like being allied by a common funeral cake on account of their presenting offerings to the three ancestors in the paternal and the maternal family of the deceased owner, is a *sapiṇḍa* ; and the text (To them must libations of water be made etc.) is intended to propound the succession of such kinsmen, and the subsequent passage (To the nearest *sapiṇḍa* etc.) must be explained as discriminating them according to their degrees of proximity. But on failure of kin in this degree, the distant kinsman (*sakulya*) is successor.[43] In this way by the application of the doctrine of spiritual benefit, as interpreted by him, Jīmūtavāhana makes room for a number of cognates to succeed even in preference to many agnates, while, according to the *Mitākṣarā*, none of them excepting the daughter's son of the deceased owner would have any place until all the agnates, however remote, are completely exhausted. The principle of spiritual benefit is therefore a characteristic guiding principle in the *Dāyabhāga* law of succession, although it cannot be said to be the sole guiding principle in as much as it is introduced apparently with the object of interpreting and corroborating specific texts of the *Dharmaśāstras*, and supplementing them where necessary,

42. Mṛtadeyamātāmahādipiṇḍāśrayasya mātulādibhir dīyamānatvāt mātulādyarthatvaṁ dhanasya dhanadvāreṇa tasyāpi tatpiṇḍadātṛtvāt. Dhanārjanasya hi prayojanadvayaṁ bhogārthatvaṁ dānādyadṛṣṭārthatvañ ca. Tatrārjakasya tu mṛtatvāt dhane bhogyatvābhāvenādṛṣṭārthatvam eva śiṣṭam. *Dāyabhāga.* 11. 6. 13.

43. Tasmāt yo yas tatkulotpanno' tadgotro'pi svadauhitrapitṛdauhitrād itaratkulotpanno vā mātulādir dhanino mṛtasya pitṛmātṛkulagatatraipuruṣikapiṇḍadātṛtayā ekapiṇḍasambandhena sapiṇḍaḥ tasya tasyāpy adhikārārthaṁ trayāṇām iti vacanam ānantaryeṇa ca viśeṣārtham anantara iti vacanaṁ varṇanīyam. *Dāyabhāga.* 11. 6. 19.

Etatparyantābhāve tu sakulyaḥ. Tad āha Manuḥ (IX. 187):
Tadabhāve sakulyaḥ syād ācāryaḥ śiṣya eva vā.
Sakulyo vibhaktapiṇḍaḥ pratipraṇaptṛtaḥ prabhṛti puruṣatrayam adhastanaṁ vṛddhaprapitāmahādisantatiś ca. *Ibid* 11. 6. 21.

but not with the design of subverting the authority by substituting an independent principle in their stead. Otherwise, as Śrīkṛṣṇa Tarkālaṅkāra points out, a stranger who throws the bones of the deceased into the Ganges, or presents funeral cakes to his departed spirit at the holy shrine of Gayā might, on the ground of superior spiritual benefit, claim his property even in preference to his relations[44]. On the other hand, the characteristic principle of the *Mitākṣarā* law of succession is the principle of propinquity with this most important qualification that no cognate excepting a daughter's son can succeed in preference to an agnate ; and even this qualification may be regarded not as an exception to the principle of propinquity, but rather as an illustration thereof in as much as under the peculiar organisation of the ancient Aryan family it was natural to regard an agnate as a nearer kinsman than a cognate, although on a mere computation of the degrees it might appear to be otherwise. The principle of spiritual benefit is not even mentioned by the *Mitākṣarā* in determining the order of succession, although Mitramiśra a follower of Vijñāneśvara in his *Vīramitrodaya* formulates and makes use of it in finding a position for the great-grandson among the direct male descendents of the deceased on whom the property devolves before the widow and the rest can claim the succession[45]. At all events, it is never brought forward to abrogate the superior position undoubtedly accorded by the ancient law-givers to the agnates in preference to the cognates with the single exception of a daughter's son. We may, therefore, say that the main distinction between the *Dāyabhāga* and the *Mitākṣarā* lies in the fact that the *Mitākṣarā* does not depart from the ancient rule which gives

44. Athaitāsāṁ smṛtīnāṁ nyāyamūlatve saty api tadbhogyapārvaṇadātari tasya gaṅgāyām asthiprakṣeptuḥ gaṅgāyāṁ piṇḍadātur vā udāsīnasyādhīkārāpattiḥ. Śrīkṛṣṇa's com. on *Dāyabhāga*, XI. 6. 33.

45. Putrādīnāṁ trayāṇāṁ pitrāditrikamahopakārakāritvāt putrādibhir gṛhītaṁ dhanasvāmina evopakārakam, upakārapratyāsattyā tadīyaṁ eva. Upakārapratyāsattiś cābhyarhitā : *Vyavahāraprakāśa* p. 505.

......tasmāt prapautraparyantābhāve vibhaktāsaṁsṛṣṭipatirikthabhāriṇī patnīti siddham. *Ibid.* p. 506.

preference to an agnate in the order of succession except in the case of a daughter's son, while the *Dāyabhāga* by introducing the principle of spiritual benefit and putting a novel interpretation upon it makes room for a large number of cognates and shifts them in and out among the agnates, so that many agnates who under the *Mitākṣarā* would have an undoubtedly superior position, are postponed to them.

This preference of agnates over cognates in the scheme of succession had its parallel in other systems of Jurisprudence. If we look to the history of Roman Law, we find that the law of the Twelve Tables recognised only the succession of (1) *Sui heredes*, (2) Agnates, (3) gentiles. Cognates had no place under this scheme, so that if there were no gentiles, the inheritance would lapse to the state rather than go to the cognates. This law appears all the more peculiar when we take into account the complication due to emancipation being regarded as a *Capitis deminutio* and hence involving a severance of the tie of agnation, so that even emancipated sons were looked upon as strangers to the family and had thus no share in the inheritance. This resulted in such a disparity between the line of succession laid down by the rules of the civil law and the direction of the natural affection of the owner, that the Praetor had to intervene to remove some of the glaring anomalies by granting what was called *Bonorum possessio* to various classes of relatives who could not be the heirs under the strict civil law. To this divergence between the law of succession and the promptings of natural affection, Sir Henry Maine attributes the horror of intestacy that prevailed among the Romans. 'Every dominant sentiment', says he, 'of the primitive Romans was entwined with the relations of the family. But what was the family ? The law defined it in one way—natural affection another. In the conflict between the two, the feeling we would analyse grew up, taking the form of an enthusiasm for the institution by which the dictates of affection were permitted to determine the fortunes of its objects'[46] ; and he explains that the feeling

46. Maine, Ancient Law, p. 222.

did not die out with the improvements introduced by the Praetors, for, 'every body conversant with the philosophy of opinion is aware that the sentiment by no means dies out, of necessity, with the passing out of the circumstance which produced it'.[47] However that may be, even in the time of Gaius the order of succession was (1) *Sui Heredes*, (2) Agnates and (3) Cognates, so that cognates could not inherit before the agnate. At last Justinian by his 118th and 127th Novels completely modelled the laws of intestate succession by abolishing the difference between agnates and cognates and creating a new order of succession under which speaking broadly the descendants succeeded first, the ascendants next, and last of all the collaterals according to nearness of kinship. It will appear from the above review that the preference of agnates in the *Mitākṣarā* law of succession has nothing unusual or extraordinary in it. Indeed, as Sir Henry Maine observes, 'there are few indigenous bodies of law belonging to the Communities of the Indo-European Stock, which do not exhibit peculiarities in the most ancient part of their structure which are clearly referable to agnation'.[48] The *Mitākṣarā* law was, however, free from the peculiar anomalies of the early Roman Law due to emancipation being regarded as a *capitis deminutio* involving the severance of the tie of agnation. In this respect the *Mitākṣarā* law was less unnatural or anomalous than the early Roman Law, for it can not be supposed that the result ascribed to emancipation by what Sir Henry Maine calls 'legal pedantry' had its counterpart in the natural affection of the parents, for as he truly points out 'enfranchisement from the father's power was a demonstration, rather than a severance, of affection—a mark of grace and favour accorded to the best beloved and the most esteemed of children'.[49] As for the general preference of agnates over cognates in the

47. Maine, Ancient Law, p. 222.
48. Ibid. p. 150.
49. Ibid. p. 222.

scheme of succession it seems that there were reasons why the seeming anomaly involved in this was not very keenly felt by the *Mitākṣarā* Hindus. In the first place, the rule that in the case of joint undivided property the interest of a deceased co-parcener passes not by succession but by survivorship would in many cases prevent the question of precedence from arising and striking the sensibility of the persons concerned as something very unnatural. In the second place, even where the question did arise, as in the case of a divided family, the close ties created by living under the peculiar organisation of the Hindu family system which was mainly agnatic would take away the point from the exclusion of the cognates by the agnates ; and lastly in the very few cases where a result would ensue from the operation of the rule of succession altogether inconsistent with the natural affection of the owner of the property, the system of adoption would serve the very same purpose as the system of making a testament under the Roman Law. In Bengal the *Dāyabhāga* practically obliterated the distinction between divided and undivided property by maintaining a conception of joint ownership which was very much laxer than that of the *Mitākṣarā*. The idea that co-owners hold their shares in quasi-severalty which they can dispose of at their pleasure bespeaks a disruption of the close ties of the old joint family system, and this, in the fitness of things, had its concomitant in the altered course of succession abandoning the almost unqualified preference given to agnates over cognates. Mr. Mayne, therefore, seems to have struck the true note when referring to the difference between the *Mitākṣarā* and the *Dāyabhāga*, he observed that 'much was of course due to the natural progress of society. A race so full of commercial activity as the Hindus who were settled along the lower course of the Ganges would find their growth crampled by the Procrustean bed of ancient traditions'. But I am not prepared to go along with him when he says that 'Brahmanism was rampant among the law writers of Bengal', and that 'it was this influence which completely remodelled the law of inheritance in that Province by applying tests of religious efficacy which were of absolutely

modern introduction'.[49a] It is true that in Bengal the law of inheritance was remodelled by giving a better position to a certain number of cognates in the scheme of succession ; it is also true that this result was achieved by applying the doctrine of religious efficacy measured in a peculiar way which seems to have been an innovation ; but I do not think that the formulation of the doctrine of religious efficacy, the peculiar interpretation put upon it, and its application to determine the order of succession were at all dictated by the influence of Brahmanism. On the other hand, I agree with Golapchandra Sarkar when he says that 'the doctrine appears to have been introduced by the author of the *Dāyabhāga* as a mere pretext for assigning in the order of succession a higher position to some dear and near cognates who, under the *Mitākṣarā*, are all postponed even to the most distant agnates, —a pretext similar to that under which the Praetor Urbanus of Rome recognised the heritable right of cognates'. Otherwise there is no reason for supposing that the influence of Brahmanism was more keenly felt in Bengal than in the sister provinces of Mithilā and Benares. Mr. Mayne himself says that while the influence of Brahmanism was more powerful in Bengal than in Southern and Western India, it must have been less powerful than in Benares which he characterises as the very hot-bed of Brahmanism. Assuming that to be so, does it not follow that neither the decay nor the vigour of Brahmanical influence could determine a peculiar development of the law of succession as that which took place in Bengal, but that other influences were at work which differentiated Bengal from the other Provinces ? I am convinced that it was the gradual disruption of the old joint family system in Bengal owing to the operation of social and economical influences that diverted the natural affection of the people into new channels, and when this took place it became difficult to stick to the old scheme of succession which directed the devolution of property in a way inconsistent with it. The altered direction of the popular feeling, therefore, demanded that

49a. Mayne, Hindu Law. p. 328.

there should be a corresponding alteration in the law ; and when Jīmūtavāhana took the matter up, he found that there was only one way of doing it ; he could not legislate, but had only to interpret the existing law, and the expedient hit upon by him to get a number of cognates interspersed among the agnates in the line of succession was to bring forward the doctrine of spiritual benefit on the authority of Manu's text, 'To three must libations of water be made etc.' by putting upon it an interpretation which would suit his purpose, and when the doctrine was once introduced, he could not but carry it to something like its logical consequences, for a Hindu jurist was nothing if not logical. It is, therefore, a mistake to suppose that a sister's son, for example, was introduced before a paternal uncle in the order of succession because the Brahmanical influence that prevailed in Bengal assigned to the former superior religious merit than to the latter, but it was because owing to the disintepration to the old family system a sister's son came to occupy a better position in the affection of his maternal uncles than he formerly did that it became necessary to re-adjust the old order of succession in order to give him a higher place therein ; and when this had to be done, the doctrine of spiritual benefit was availed of as a means to an end, because it furnished a consistent theory, had a chance of standing the test of criticism and controversy and was, at the same time, not repulsive to the sentiments of the people. The highly artificial character of the arguments which Jīmūtavāhana was forced to use to establish that the maternal uncle and other relatives connected through the mother confer spiritual benefit upon the deceased owner in order to make room for them before the *sakulyas* (or distant agnates) at once demonstrates that he was not so much anxious for the repayment of actual religious merit as for giving a better place in the line of succession to a class of cognates whose claims, for other reasons, he wanted somehow to advance ; otherwise, it would have been the easiest thing for him to show that agnates, although they may belong to the class of *sakulyas*, conferred more spiritual benefit upon the deceased than a maternal relation could possibly do.

The principles to which I now wish to draw your attention are common to both the *Dāyabhāga* and the *Mitākṣarā* Schools, although here and there, there may be differences in detail. The first of these principles to which I will advert is the exclusion of females unless admitted by virtue of special texts. The *Dāyabhāga* expressly recognises the principle on the authority of the text of Baudhāyana, and explains that the succession of widow and certain other women does not contradict this rule in as much as they take under special texts.[50] It is true that the *Mitākṣarā* does not in so many words lay down the the principle, but the general outline of the *Mitākṣarā* scheme of succession clearly indicates its recognition and the *Vīramitrodaya* and the *Smṛticandrikā* both expressly lay down the rule in unhesitating terms. It appears from the authorities relied on in support of this position, that it is as old as the Vedas, and it is even doubtful whether in ancient times it was not even more stringently exclusive than we at present find it to be. Thus in dealing with the succession to males, the *Vīramitrodaya* says, "As for the text of the *Smṛti*, namely—'Therfore women are devoid of the senses and incompetent to inherit', and for the text of Manu based upon it, namely—'Indeed the rule is that women are always devoid of senses and incompetent to inherit',—these are both to be interpreted to mean to refer to those women whose right of inheritance has not been expressly declared. Haradatta also has explained (those texts) in this very way, in his *Commentary on the Institutes of Gautama called Mitākṣarā*. But some (Commentators) say that the term 'incompetent to inherit' implies censure only, by reason of its association with the term 'devoid of the senses'. This is not tenable, because it cannot but be admitted that the portion, namely, 'incompetent to inherit' is prohibitory and not condemnatory"[51] In another passage dealing with succession to Strīdhana property he

50. Patnyādīnāṁ tu adhikāro viśeṣavacanād aviruddhaḥ.
Dāyabhāga. XI. 6, 11.

51. Yat tu, 'tasmāt striyo'nindriyā adāyādā' iti śrutivacanaṁ, tanmūlakaṁ ca, 'nirindriyā hy adāyādāḥ striyo nityam iti sthitiḥ' iti Manuvacanam (IX.18), tad dvayam api yāśāṁ śṛṅgagrāhikayā

reiterates the same opinion and says : 'But the daughter-in-law and others (of the same sex) are entitled to food and raiment only ; for the nearness as a *sapiṇḍa* is of no force when it is opposed to express texts'. Since a text of the *Śruti* declares,—'therefore women are devoid of the senses and incompetent to inherit',—and a text of Manu, founded upon it, says—'Indeed the rule is that, devoid of the senses, and incompetent to inherit, women are useless'—the conclusion arrived at by the author of *Smṛticandrikā*, Haradatta, and other Southern commentators, as well as by all the Oriental commentators such as Jimūtavāhana, is that those women only are entitled to inherit whose right of succession has been expressly mentioned in such texts as—'The wife and the daughters also etc.' but that others are certainly excluded from taking heritages by the texts of the *Śruti* and of Manu'.[52] This makes it perfectly clear that the principle of the exclusion of females was recognised on all hands, and had been so recognised from a very ancient time. It was indeed a corollary from the position of a female in the organisation of the ancient Aryan Society. There her position was one of life long dependence. So Manu says—The father protects a woman in her childhood, the husband during her youth, the son in old age ; a women has no right to independence'.[53] That being her position, it was quite natural that she

dhanagrahaṇaṁ noktaṁ tadviṣayam avaseyam. *Gautama-Mitākṣarāyāṁ* Haradatto'py evam āha. Kecit tu nirindriyapadasamabhivyāhārāt nindāmātraparam tad ity āhuḥ. Tan na, dāyādatvāṁśe nindāyā niṣedhakalpanāvaśyambhāvāt rāgād dāyagrahaṇaprāpter nityānuvādasambhavāt. *Vyavahāraprakāśa*, p. 517.

52. Snuṣādīnāṁ tu grāsāchhādanamātrabhāktvam. Vacanavirodhe sapiṇḍavatpratyāsatter aprayojakatvāt. 'tasmāt striyo nirindriyā adāyā, iti śruteḥ. 'Anindriyā hy adāyāś ca striyo'nṛtam iti sthitiḥ "iti tanmūlaka-Manuvacanāc ca. Śṛṅgagrāhikayā yatra kaṇṭhoktaḥ 'patnī duhitaraḥ ityādau yāsāṁ strīṇāṁ dhanādhikāras tāsām eva. Anyāsāṁ tu śrutimanuvacanābhyāṁ dāyagrahaṇanisedha eveti Smṛticandrikākāra-Haradattādīnāṁ dākṣiṇātyanibandhṛṇāṁ Jīmūtavāhanādipaurastyasarvanibandhṛṇāṁ siddhāntāc ca.

Ibid. p. 554.

53. Pitā rakṣati kaumāre bhartā rakṣati yauvane/
Rakṣanti sthavire putraḥ na strī svātantryam arhati/*Manu*, IX. 3,

could not take the inheritance, and the few eases in which she was called to do so seem to have been subsequent concessions made for special reasons in favour of a few very near relations such as wife, daughter, mother and the like. I do not here propose to enter into a discussion as to how the right of each of these female relatives grew up, as the point has been elaborately discussed by Mr. Mayne in chapter XVII of his valuable work on Hindu Law, but I may point out in passing as it may be interesting to you that even the right of the widow to inherit her deceased husband's property was not for a long time clearly recognised and that the celebrated drama *Abhijñānaśakuntalam* of Kālidāsa contains an indication of this where the king, being reported that a certain merchant was dead without any issue so that his estate should escheat to the Crown, directs an enquiry as to whether any of his widows was enciente, an enquiry which would have been unnecessary if a widow could take the property in her own right.

The *Vyavahāramayūkha*, which is recognised as an authority in Bombay, admits the claim of a sister, and gives her a very high position in the law of succession, *viz.*, after the grandmother and before the grandfather. This it does on the ground that she is a *gotraja* being born in the family of the propositus, although she may be transferred to another *gotra* by marriage, and as such entitled to inherit in order of propinquity. The way in which the Bombay High Court has admitted other females into the line of succession does not seem to me to be based on any intelligible principle but must be rested on special custom and the analogy of the reasoning employed by the *Mayūkha* in admitting the sister's right. The Madras High Court, also while professing to follow the *Mitākṣarā* has admitted the claim of a number of females to inherit as *bandhus*, but this position is hardly justified by the *Mitākṣarā* and clearly contrary to *Smṛticandrikā* which is an undoubted authority of the Southern School. These decisions, therefore, exhibit a clean departure from the law as originally laid down by the sages and interpreted by the authoritative commentators.

The conclusion, therefore, at which we arrive is that both

the *Dāyabhāga* and the *Mitākṣarā* recognise the principle of the exclusion of females from inheritance unless admitted by special texts with this difference that in the case of the property of an undivided co-parcener no question of succession can properly arise under the *Mitākṣarā* Law by reason of the operation of the rule of survivorship and hence women who can only take by way of succession cannot claim the same, while under the *Dāyabhāga* Law which makes no distinction between the properties of divided and undivided co-parceners for the purposes of inheritance, women inherit both kinds of property in exactly the same way, a difference which as I have already sought to explain, is connected with a corresponding difference in the conception of co-ownership, the result, perhaps of a disintegration of the ancient joint family system in Bengal owing to the operation of social and economic causes to which I need not have advert.

Exclusion from Inheritance.[54] Under the Hindu Law there are several grounds for exclusion from inheritance, and they may be broadly divided into three classes : (1) Physical disease or deformity of a certain type, (2) Mental incapacity, and (3) Moral or religious disqualification. Under the first division may be mentioned, congenital blindness and deafness, dumbness, lameness, impotency, leprosy and other incurable virulent diseases. Insanity and idiocy are causes of exclusion coming under the second division of mental incapacity. Commission of a vice leading to ex-communication, being born of a father who has been so ex-communicated, assumption of the order of ascetics and unchastity in the case of a widow are moral and relegious disqualifications which exclude a person from inehritance. As regards physical deformity the text of Manu[55] clearly shows that blindness and deafness must be congenital to be a bar to inheritance, and that being so it is difficult to see why the same condition should not be attached to other physical

54. For a discussion of this topic vide,
Kane, *History of Dharmaśāstra*,, Vol. III, p, 608 ff.

55. Anaṁśau klībapatitau jātyandhavadhirau tathā/
Unmattajaḍamūkāś ca ye ca kecin nirindriyāḥ//
Manu, IX, 201. *Vide also Yāj.* II 140.

deformities such as dumbness and lameness. As regards moral or religious disqualifications they are sometimes expiable, and when so expiated cannot be a ground for disinherision. The disqualification, however, is in any case personal, so that the son of a disqualified person may inherit the property although the father cannot, and moreover, the person so excluded from inheritance becomes entitled to maintenance except when the exclusion is due to the commission of a sin leading to excommunication, or to being born of a father so excommunicated.[56] Having thus indicated the causes of exclusion from inheritance the next question is, what is the point of time at which the cause must exist in order that the effect may follow. As regards the *Dāyabhāga*, there can be no difficulty, for succession opens out, according to it, on the extinction of the ownership of the previous owner and that is the moment at which the disability must exist in order to shut out a person otherwise entitled to inheritance.

The *Mitākṣarā*, however, lays down that it is the existence of the disqualification at the moment of the division of the property that excludes a person from getting his share, but one already separated from his co-heirs is not deprived of his allotments by the subsequent accrual of any disqualifying defect and what is more, it goes on to say that the removal of the defect, even after partition, will entitle the person so freed from the disqualifying cause to have the partition reopened and get his share in the property.[57] It does not seem that according to the *Dāyabhāga* the devolution of inheritance can be disturbed by reason of the subsequent removal of the disqualifying defect, for in the absence of express authority an inheritance must remain where it has fallen.

56. Note here the text of Devala recorded in the *Dāyabhāga*, V, 11.
Mṛte pitari na klībakuṣṭhyunmattajaḍāndhakāḥ/
Patitaḥ patitāpatyam liṅgī dāyāṁśabhāginaḥ//
Teṣāṁ patitavarjebhyo bhaktavastraṁ pradīyate/
Tatsutāḥ pitṛdāyāṁśaṁ labheran doṣavarjitāḥ//

57. Eteṣāṁ vibhāgāt prāg eva doṣaprāptāv anaṁśatvam upapannaṁ na punar vibhaktasya. Vibhāgottarakālam apy auṣadhādinā doṣanirharaṇe bhāgaprāptir asty eva, 'vibhakteṣu suto jātaḥ savarṇāyāṁ vibhāgabhāk (*Yāj*. II. 122) ity asya samānanyāyatvāt. *Mit*. on *Yāj*. II. 140.

This brings up to the consideration of two principles which have often been pronounced to be principles of Hindu Law, *viz.* (1) that succession can never remain in abeyance and (2) that an estate once vested can not be divested.

As regards the principle that succession can never remain in abeyance, it is not a principle founded upon any special text, but is a logical deduction from the conception of succession. According to the Hindu Law title by succession arises without any reference to the volition of any individual by the operation of a rule of law, and since this rule comes into operation at once on the extinction of the previous ownership, it follows that there cannot be any interval between the extinction of interest of the predecessor and the accrual of the interest of the successor, for, were it otherwise, then during the interval the property would be reduced to the condition of a *res nullius*. In this respect, therefore, it differs from the Roman Law according to which acceptance of the inheritance by the heir, except in the case of a *suus heres* who was on that account called *heres necessarius*, was a condition of the estate being vested in him ; the result of this was, as Sir William Markby points out, that "there was a space of time, very often a considerable one, during which, whatever the theory might be the inheritance did in fact belong to no one. This difficulty was partly got over by the doctrine of 'relation back' as it is called, that is to say, the heir, though he was not really heir before he accepted, yet, when he accepted, was treated exactly as if he had succeeded immediately on the death of the owner. Still the difficulty remained, that in the interval the inheritance was vacant, which might give rise to practical inconveniences which no fiction could remedy."[58]

As regards the other principle that an estate once vested cannot be divested, I do not see why it should be regarded as a special principle of the Hindu Law, when an estate once vests in a person, it must follow from the universal principle of reason that there cannot be an effect without a cause, that it cannot be divested unless a sufficient ground for it supervenes,

58. Markby, *Elements of Law*, Chap. XVIII.

and it may be observed that under the Hindu Law there are occasions on which an estate once vested is actually divested, although, it must be admitted, that such occasions are exceptional in their character.

Thus the birth of a posthumous son, the adoption of a son by a widow after the death of her husband, and the removal of disqualification of an heir even after the distribution of property under the *Mitākṣarā* Law furnish instances where property once vested in one person is divested and passes to another. Of course, when no such ground exists the property must remain where it lies, simply because there is nothing to remove it, so that the high-sounding proposition that 'an estate once vested connot be divested' really amounts to nothing more than this, that a person who acquires an ownership remains owner until for some sufficient reason he ceaess to be an owner.

The lecture has already become too long and here I close it with the hope that although the details of the subject can only be gathered from text-books specially dealing with the same, the principles explained above will place them in their true light and afford a rational basis for taking a connected view of the whole.[59]

59. Special reference for this section should be made of:

Rajkumar Sarbadhikari, *The Principles of Hindu Law of Inheritance* (Calcutta University Tagore Law Lecture, 1880).

J. Jolly, *Outlines of a History of the Hindu Law of Partition, Inheritance and Adoption* (Calcutta, 1885).

On partition the modern Law cases have been discussed in detail in Ram Charan Mitra, '*The Law of Joint Property and Partition in British India* (Calcutta, 1897), pp. 292-362.

Kisori Lal Sarkar, *The Mīmāṁsā rules of interpretation as applied to Hindu Law*, (Calcutta 1909), pp. 383-413.

LECTURE VI

THE LAW OF PLEDGE.*

Pledge treated as a security for the re-payment of a debt—Two modes of ensuring the confidence of a creditor—Pledge creates a real right—Pledge (*ādhi*) defined—Division of pledges—Four-fold division by Nārada—Eight-fold division by Bṛhaspati—The two classifications how reconciled by *Smṛticandrikā*—by *Kṛtyakalpataru*—The principles of classification—could there be a pledge without delivery of possession—Shibchandra Ghosh *v.* Russickchandra Neoghy—Mr. Justice Grant's judgement—Dr. Ghosh's criticism—Elements of truth in the aforesaid judgement—The question discussed : arguments pro and contra—Arguments for an answer in the negative—Etymological meaning of the word *ādhi*—The division of a pledge into two classes *gopya* and *bhogya*—Nature of the rights and obligations.—Was hypothecation likely to be regarded as a sufficient security ?—Disadvantages of hypothecation—Yājñavalkya's text —Nārada's text—Arguments in favour of an answer in the affirmative considered—A passage from *Mitākṣarā* cited by Dr. Ghosh—True import

* For important contributions on this topic the following may be referred to :

Thomas Strange, *Hindu Law*, I. (London, 1830), 228-292 ; Rash Behary Ghosh, *The Law of Mortgage in India* (Calcutta, 1877) ; K. M. Chatterjee, *The law relating to the transfer of immovable property* (Calcutta, 1890), 340-408 ; J. Jolly, *Recht und Sitte* (Strassburg, 1896) tr. into English by B K. Ghosh under the title—*Hindu Law and Custom* (Calcutta, 1928), 219-221 ; J. H. Wigmore, 'The pledge-idea : a study in comparative legal ideas, II. in Harvard Law Review, X. No. 7. (1897) 416-417 ; K. P. Jawaswal, *Manu and Yājñavalkya*, (Calcutta, 1930), 210-216 ; Ganga Nath Jha, *Hindu Law in its Sources*, I, (Allahabad, 1930), 152-177 ; Niranjan Roy. 'The ancient Hindu law of pledge and bailments' in the Journal of the Department of Letters, Calcutta University, Vol. XXXII, (1939), 1-120 ; Mati Lal Das, *Hindu law of bailment* (Khulna, 1946), 231-259 ; P. V. Kane, *History of Dharmaśāstra*, III. (Poona, 1946), 411-439 ; N. C. Sen Gupta, *Evolution of ancient Indian law* (Calcutta, 1953), 239 ; J. D. M. Derrtt, 'The development of the concept of property in India', in Zeitschrift fur Vergleivchende Rechtswicsenschaft, 1962, 78-85 ; Ludwik Sternbach, *Juridical studies in ancient Indian Law*, I, (Delhi, 1965), 109-152 ; H. Chatterjee, *The law of debt in ancient India*, (Calcutta, 1971), 211-297.

of the passage—The passage does not solve the question—What the question really amounts to—No trace of hypothecation in the *Mitākṣarā*—A text of Bṛhaspati quoted by Jagannātha—This also does not lead to any definite conclusion—Dr. Ghosh's argument based on the etymology of the word *bandhaka*—The argument not conclusive—A different etymological meaning attributed to the word by Jagannātha—The two words *ādhi* and *bandha* sometimes used as synonymous—How the suggested transition can be worked out—Evidence to show that a pledge without delivery of possession was recognised by later Hindu Law—Jagannātha's comments on Kātyāyana's text—Halāyudha's view—The value of this opinion to show that hypothecation prevailed in Bengal—A passage from Raghunandana's *Dāyatattva* supports the conclusion—why hypothecation should find a readier acceptance in Bengal ?—Evidence of prevalence of hypothecation outside Bengal—*Vyāvahāramayūkha*—successive stages in the transition to hypothecation—A text of Bṛhaspati distinguishing between *ādhi* and *bandha*—A text of Nārada to explain the distinction quoted by *Vīramitrodaya*—The first stage in the transition : property placed in the hands of a third party—The second stage : the stake-holder transformed into a surety for the production of the pledge—The last stage in the transition : The intervention of a third party dispensed with—Importance of the transition : what it demonstrates—Rights of the pledgee—Pledge for a definite period : no redemption after the expiry of the period—Pledge without a period fixed—When the right of redemption ceases, if the pledge be for mere custody—Period of grace—Pledge for use without a definite period fixed : no forfeiture—A further distinction in regard to a pledge for use—The usufruct may be enjoyed in lieu of interest : or it may go to satisfy the principal as well—The duty of the pledgor in the former case—No forfeiture in the latter case—A pledge of this latter class is known as *kṣayādhi* and resembles the *vivum vadium* of the old English Law—Improvement or deterioration of the pledge : its effect—when the pledgor gets back his property—Pledgee bound to release the property upon satisfaction of the debt before the foreclosure becomes absolute—An exception to the rule in the case of usufructuary mortgage for a definite period—when can the creditor sell the property pledged ?—The right of sale given as an exception to the right of forecloser—Two special kinds of pledge : *caritrabandhaka* and *satyaṁkārakṛta*—The rules summarised—If upon a sale, there remains a surplus, the debtor becomes entitled to it—But what if the price falls short ?—Method of carrying out the sale—A pledge created a real right—The *Mitākṣarā* supports this position—The security furnished by a pledge was a real security—was it so in the days of Manu ?—Power to create a sub-mortgage—How far limited according to *Vīramitrodaya*—Doubts thrown by Medhātithi and Govindarāja—How met by the *Mitākṣarā*—Kullūkabhaṭṭa's criticism—Power to demand fresh security or payment of the money in certain cases—Similar rule in the French code—Compared to sec. 68 of T. P. Act.

—Rights of the pledgor, and consequent duties of the pledgee—Duty to use proper care—Duty not to use a pledge for custody—Duty to return the pledge when the debt has been paid off—Payment how to be made if the pledgee be absent—Right of the pledgor to sell or mortgage the property pledged—His ownership not affected by the pledge—Could he create a second mortgage?—The question discussed—Dr. Ghosh's view—This is doubtful—The *Mitākṣarā* view—It may be that a second mortgage was gradually recognised as valid—Even this is doubtful—*Cf. Vīramitrodaya* —Priority of mortgages—The general rule: prior in point of time prevails—But prior from what standpoint?—Priority by reference to possession; see *Vīramitrodaya*—Dr. Ghosh's view doubted—*Mitākṣarā* in agreement with *Vīramitrodaya*—*Cf.* Aparārka—Conclusion—Priority when the transactions were contemporaneous—Similar rule in the Roman Law—What if possession is sought at the same time?—Special rules when the above considerations do not apply—The Hindu Law of Pledge logical and reasonable—'A mode of good sense and logical consistency'.

In the last four lectures I have dealt with ownership and the various modes of its acquisition whether original or derivative. In the present lecture I propose to discuss the Hindu Law of Pledge. The Hindu lawyears deal with this subject in connection with recovery of debt, for a giving of pledge, according to them, is a form of furnishing security for the repayment of debt. Or in other words, it is a mode of ensuring the confidence of the creditor. So Nārada says, 'surety and pledge, these are the two sources of ensuring the confidence of the creditor.'[1] Among the two I propose to deal with the law of pledge at this place, because the giving of a pledge involves, as you will find, the transfer of an interest in property in favour of the creditor which under certain circumstances matures into full ownership, and thus creates a real right as distingiushed from a right corresponding to a mere personal obligation, so that in logical order of sequence the discussion of this subject should come immediately after the discussion of the transfer of full ownership with which I was busy so long.

1. Viśrambhahetū dvāv atra pratibhūr ādhir eva ca.

Nāradasmṛti, IV. 117.

Caṇḍeśvara in his *Vivādaratnākara* explains *viśvāsa* as: prayuktarṇaprāptiviśvāsaḥ.

The ordinary Sanskrit equivalent of the word pledge is *ādhi* which is thus defined in *Mitākṣarā* : 'whatever is placed under the control of the creditor by the debtor as a security for the thing lent to him is called an *ādhī*'.[2] It may be of various kinds. So Nārada first divides it into two classes *viz.*, (i) that redeemable within a definite time (*kṛtakālāpaneya*) and (ii) that given for an indefinite period until the repayment of the debt, (*yāvaddeyodyata*) and these two classes are again divided into two, in as much as they may be either for custody or for use.[3] Bṛhaspa i gives a somewhat different classification. He begins by saying that a pledge is of four kinds, and then goes on to specify an eight-fold division *viz.*, (1) movable, (2) immovable, (3) for custody, (4) for use, (5) discretionary (i.e. without a time limit), (6) with a fixed time limit, (7) evidenced by a document, and (8) evidenced merely by witnesses.[4] This apparent inconsistency is then reconciled by *Smṛticandrikā* by saying that although the divisions actually enumerated are eight yet the principal divisions are four as enumerated in the text of Nārada, in as much as they are productive of important consequences, while the reminder of the classification, being of minor importance, may safely be ignored. On the other hand, Lakṣmīdhara in his *Kṛtyakalpataru* makes a very ingenious suggestion which, to my mind, affords a more acceptable solution of the puzzle : it says that although the divisions enumerated are eight in number, yet the classification is really four-fold since the principles of classification are four *viz.*, (1) nature of the property pledged, (2) form of the pledge, (3) time relation and (4) nature of the evidence by which the pledge is supported

2. Ādhir nāma gṛhītasya dravyasyopari viśvāsārthaṁ adhamarṇenottamarṇo'dhikriyate ādhīyate ity ādhiḥ. on *Yāj.* II. 58.

Cf. Adhikriyate ity ādhiḥ *Nārada*, IV. 124. For other interpretations vide *Vyavahāraprakāśa*, (P). 214 ; *Madanaratnapradīpa*, 145, *Smṛticandrikā*. Vy. Kāṇḍa, II, 318 ; *Vivādaratnākara*, p. 5.

For detailed discussion vide H. Chatterjee, *The Law of debt in ancient India*, pp. 211-13.

3. *Nārada*, IV. 124, 125, 139.

4. Adhir bandhaḥ samākhyātaḥ sa ca proktaś caturvidhaḥ/
Jaṅgamaḥ sthāvaraś caiva gopyo bhogyas tathaiva ca/
Yādṛcchikaḥ sāvadhiś ca lekhyārūḍho'tha sākṣimān//*Bṛ. S*, X.38-39.

(*svarūpa-prakāra-kāla-pramāṇaiḥ caturvidhaḥ*). According to the nature of the property a pledge is either movable or immovable; according to the form it is either for custody or for use; according to time relation it is either with or without a time limit; and according to the nature of the evidence it is either supported by a document or merely by witness.[5] The way in which the differences, indicated by these divisions affect the incidents of the pledge will be pointed out later on.

It will be seen from the classification given above that although a pledge is distinguished into a pledge for custody and a pledge for use, there is no suggestion for a third class, *viz.*, a pledge which is not accompanied by possession. This raises the question whether under the Hindu Law there could be a pledge without the accompaniment of delivery of possession, or, in other words, whether the very nature of the transaction did not involve the transfer of possession from the pledgor to the pledgee as an element in its constitution. The question was raised before the late Supreme Court of Calcutta in the case of *Shibchandra Ghose v. Russickchandra Neoghy*[5a] and the majority of the court held that whatever might have been the case in early times, the later Hindu Law recognised the validity of a pledge although unaccompanied by possession, and they relied in support of this conclusion upon some of the texts of Hindu Law as well as upon the general usage of the country. Mr. Justice Grant however, was of a different opinion and held that delivery of possession was necessary to the validity of a pledge in Hindu Law and that this was also in conformity with the general principles of natural law. The argument of Mr. Justice Grant, in so far as it is based upon a consideration of the so-called law of nature, is somewhat difficult to follow, for, as Dr. Ghosh points out, "if it were not for the peculiar views about the law of nature so widely prevalent at the time, Mr. Justice Grant could

5. Tatra svarūpam eva dvividhaṁ, sthāvara-jaṅgamabhedeṇa. Prakāraś ca dvividho gopya-bhogyabhedena. Kālo dvividhaḥ avadhiniyamāniyamābhyām. Pramāṇaṁ dvividham, lekhya-sākṣyādibhedena.

Kṛtyakalpataru, (Vyavahārakāṇḍa,) p. 292. Edn. G.O.S. No. CXIX. Baroda, 1953)

5a. Fault. 36.

hardly have failed to perceive that the Hindu Law might have been developed in course of time in the same manner as the Roman Law was developed by the introduction of hypothecation."

The element of truth which it probably contains, although expressed in a somewhat obscure lauguage, is that having regard to the purpose for which a pledge was required, *viz*, ensuring the confidence of the creditor, it was not likely that a pledge unacompanied by possesion would, in the early stages of society, meet the end so that in the order of evolution, the recognition of hypothecation is a later juridical phenomenon than the prevalence of pledges accompanied by possession.

But, then, just as in the later Roman Law, the altered conditions of the time led to the recognition of hypothecation unacompanied by possession as a valid transaction. So it is not at all unlikely in the nature of things, that a similar transition should also take place in the later Hindu Law. On the other-hand, if the growth of hypothecation was a natural growth determined by circumstances which might appear anywhere, it would be only reasonable to expect that its recognition would not be confined to a particular system of laws, but find a place in other systems as well. *Prima facie*, therefore, we cannot attach much importance to this sort of *a priori* speculation, and the real question is whether upon the evidence available to us we can say that the Hindu Law did recognise the validity of a pledge unaccompanied by possession. On giving the matter my best consideration I have come to the conclusion that our *Dharmaśāstras* do not contain much evidence of the prevalence of a hypothecation ; on the other hand the scheme of the law bearing upon the subject and the rights and obligations arising under it all go to show that a pledge involved the placing of a property of the debtor under the control of the creditor as a security for the payment of the debt. In support of this position, I may begin by referring to the definition of '*ādhi*' which I have already placed before you, for it shows that the term denotes a thing placed under the control of a creditor in order to ensure his confidence, and indeed the etymology of the word (*ādhīyate ity ādhiḥ*) supports this definition ; in the second

place the division of a pledge into two classes, i.e. for custody (*gopya*) and for use (*bhogya*) suggests the same conclusion, for the recognition of hypothecation will require the admission of a third class of pledge which is neither for custody (*gopya*) nor for use (*bhogya*) ; in the third place the various rights and obligations of the pledgor and pledgee to which I will presently advert contemplate the pledgor parting with his possession at the time of creating the pledge. It seems to me that it is but natural that this should be so, for what is hypothecation but an agreement on the part of the debtor to hold his property as a security for the fulfilment of his engagement to repay the loan, and could it under ordinary circumstances be sufficient to ensure the confidence of the creditor ? It is practically one promise (*viz.* to hold the property as a security) on the top of another (viz., to repay the loan) and if it could be relied on, why not the bare promise to repay ? It may be said that a hypothecation creates a qualified right in the property hypothecated in as much as it gives you a right to sell the property under certain circumstances. That is quite true, but it must be remembered that the right can only be exercised if the debtor retains the property, for, if he sells it off to a *bona fide* purchaser, the situation will be this, that if you allow the hypothecation to prevail, the honest purchaser is defrauded and deprived of his property without any fault of his own ; while if you do not, the hypothecation practically loses the whole of its value. These disadvantages of hypothecation are so palpable that I am not quite sure that a Hindu creditor would not have reposed more confidence in a solemn promise exacted from the debtor, such as is involved in what is called a pledge of religious merit (*caritrabandhaka*)[6] according to one of the interpretations, whereby the debtor, for instance, says to his creditor 'until I repay the loan I will not bathe in the Ganges' or 'the benifit of my ablution in the Ganges shall accrue to you', than in a security like this, and to this stage

6. The *Caritrabandhakakṛta* type of pledge has been mentioned by Yājñavalkya (II. 61). Vijñāneśvara has explained the significance of the term in his commentary. For details of this type of pledge vide Chatterjee, *The Law of Debt*, pp. 235-237.

of feeling are to be attributed the text of Yājñavalkya, "By the acceptance of a pledge is its validity maintained"[7] and the text of Nārada attributed by Jagannātha to Vyāsa, "Pledges are declared to be of two sorts, immoveable and moveable, and both are valid when there is actual enjoyment, and not otherwise".[8] All these considerations, therefore, combine to show that in the early Hindu Law a pledge without the accompaniment of delivery of possession was not usually recognised.

Let us now consider the evidence which has been supposed to indicate the existence and recognition of a hypothecation under the Hindu Law. In his work on Law of Mortgage, Dr. R. B. Ghosh quotes a passage from the *Mitākṣarā* in support of the position that in the mature Hindu Law the rule requiring tradition had fallen into disuse, and that a real right, whether by mortgage or sale, could be created by a mere expression of of the intention of the parties. The passage cited is one to which I have already had occasion to draw your attention in another connection. It is this : "The acceptance of gold, clothes, etc., being completed by the ceremony of bestowing water and falling therefore under either of the means, may be designated as a threefold acceptance ; but in the case of land as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession ; otherwise the gift, sale, or other transfer is not complete. A title, therefore, without corporeal acceptance, consisting of the enjoyment of the produce, is weaker than a title accompanied by it or with such corporeal acceptance. But such is the case only. when of these two the priority is undistinguishable, but when it is ascertained which is first in point of time and which is posterior, then the simple prior title affords the stronger

7. Adheḥ svīkaraṇāt siddhiḥ. *Yāj.* II. 60
8. Adhis tu dvividhaḥ proktaḥ sthāvaro jaṅgamas tathā/
Siddhir asyobhayasyāpi bhogo yady asti nānyathā//
Nārada. IV. 139.
Mītramiśra explains : Gopyādhau bhogaḥ svīkāraḥ, bhogyādhau phalabhogaḥ. Vīr. Vya. p. 229.

evidence".[9] I am afraid that this passage does not support the conclusion for which it is sought to be used. It is true it shows that tradition is not necessary to complete a transfer of property, but that it is of importance only when a question of relative superiority arises between two transactions where priority in time cannot be ascertained and it does not affect the other question whether from the very nature of a pledge delivery of possession by the debtor to the creditor is not one of its constituent elements. The fact is that the above observations were made by Vijñāneśvara in connection with the question of acceptance. Acceptance, he says, may take either of three forms; it may be mental, verbal or corporeal, and in order that the acceptance of a transfer may be complete, it is not absolutely necessary that it should take the corporeal form; although, in so far as corporeal acceptance, which involves an assumption of possession, and in the case of land, some enjoyment of usufruct, is more tangible and easily demonstrable, it determines the relative superiority between two transfers where priority in point of time cannot be clearly ascertained. It therefore follows that in so far as assumption of possession may be regarded as part of acceptance, it is not really indispensable, but it does follow that delivery of possession can be dispensed with even when the very nature of the transaction involves it as one of its constituent elements. I am, therefore, of opinion that the above observations were made by Vijñāneśvara in connection with a transfer of ownership such as a gift or a sale, and not in relation to a pledge, and that so far as this latter transaction is concerned, the question whether it does not involve delivery of possession by the debtor to the creditor as one of its constituent elements is not at all affected by it. To put the same matter in another form: suppose a debtor offers a pledge and the creditor accepts it; the contract is complete without any delivery of possession, since acceptance is not necessarily corporeal, but the question remains whether the creditor is not entitled to demand possession: if a pledge involves delivery of possession as one of its constituent elements, he is; but if it does not,

9. Vide Vijñāneśvara's commentary on the *Yājñavalkyasmṛti*, II. 27.

the pledge is a mere hypothecation of the Roman Law, and he is not. The question whether the Hindu Law recognised a transaction of the latter kind does not find any solution from the passage quoted above nor is there any other passage in the *Mitākṣarā* to show that it did. There is a text attributed by Jagannātha to Bṛhaspati which is sometimes cited in support of the recognition of a pledge without possession. It runs thus: "of him who does not enjoy a pledge, nor possess it, nor claim it on evidence, the written contract for that pledge is nugatory, like a bond when the debtor and witnesses have deceased". This seems to me to lay down a rule of evidence, and is besides of such a doubtful import that it does not lead to definite conclusion as to whether there could be a pledge without possession. It must also be remembered that Bṛhaspati divides a pledge with reference to its form into two classes, *viz.*, pledge for custody and pledge for use, and, that being so, it becomes difficult to infer that in the text quoted above he recognises a third class of pledge which is neither for custody nor for use. Referring to the use of the word *bandhaka* to designate a pledge, Dr. Ghosh suggests that "change from *ādhi* to *bandhaka* marks the progress from a pledge with possession to a pledge not followed by delivery or in other words to hypothecation". This suggestion is based by him upon the etymology of the two words, for he says that while the word *ādhi* signifies bailment, *bandhaka*, the word now in familiar use among the Hindus, like lien in the English law, imports merely a tie or nexus. There may be good deal in this suggestion, but, with all deference, I am bound to point out that an argument upon the etymology of a Sanskrit word is seldom conclusive, for it is often quite possible for a Sanskritist to give it a different turn. Thus with reference to the etymology of the word *bandhaka* Jagannātha says: '*bandha*' is derived in the passive form, "that which is bound or pledged (*bādhyate*)". A male slave or the like, being bound or confined is then unable to perform service for his master; a horse also being bound or tied, is then unfit for his owner's use. By acceptation, the sense of the word '*bandha*' is a thing remaining in

the creditor's possession by an agreement on the part of the debtor in this form, 'this chattel shall remain in thy possession so long as I do not repay the money'. Accordingly it is said by eminent logicians that 'the meaning of words is apprehended by grammar, by analogy, by dictionaries, by original instruction, and by practice or acceptation'. It is plain that if this interpretation be accepted, the etymology of the word *bandha* instead of supporting Dr. Ghose's theory really goes against it. It must also be remembered that Bṛhaspati begins his discussion of the law of pledge by saying that 'an *ādhi* is also called a *bandha* and it is of four different kinds',[10] and in many texts of Hindu Law the two words are used as synonymous. I am, however, disposed to think, on other grounds, that the suggestion that 'the change from *ādhi* to *bandhaka* marks the progress from a pledge with possession to a pledge not followed by delivery or in other words to hypothecation' is not without foundation, and what is more, it also helps us to mark out the several stages in the transition from the former to the latter, and this I shall presently try to show. In doing this I shall first place before you indisputable evidence to show that a pledge without possession was recognised by the later Hindu Law, and I shall then try to explain the causes which determined its recognition, and reconstruct the several stages through which the transition, in all probability, came about. There is a text of Kātyāyana which dealing with the priority between two pledges says, "If a pledge, a sale, or a gift of the same thing be made before witnesses to one man, and by a written instrument to another, the writing shall prevail, because one transaction only can be maintained".[11] Commenting upon this Jagannātha observes that 'Halāyūdha says if there be no occupancy

10. Ādhir bandhaḥ samākhyātaḥ sa ca proktaś caturvidhaḥ
Bṛ. Sm, X. 38.

11. Ādhānaṁ vikrayo dānaṁ lekhyasākṣyakṛtaṁ yadā/
Ekakriyāviśuddhaṁ tu lekhyaṁ tatrāpahārakam// *Kātyāyana*, 518.

This text of Kātyāyana has been referred to in the *Smṛticandrikā* III. 338 ; *Parāśaramādhava. III.* p. 235. P. V. Kane translates this verse as : 'when a mortgage, sale and gift are made by means of a document and by means of witnesses, the transaction effected by a document would

but a writing exists duly attested and so forth, the writing shall prevail because it is the best evidence of a transaction; it shall establish the mortgage. It is hereby intimated that if there be written and verbal contracts, a mortgage is not of course invalid for want of occupancy'.[12] Now Halāyudha, as you are perhaps aware, was the chief judge in the reign of Lakṣmaṇa Sena, one of the Sena kings of Bengal, and his opinion may be regarded as quite conclusive regarding the prevalence of hypothecation at least in Bengal.[13] A few centuries after this, Raghunandana, who is known as the *Smārta Bhaṭṭācārya* in Bengal and whose work known as *Aṣṭāviṁśatitattva* at present regulates the ceremonial law of that province, writes in his *Dāyatattva*: "Thus also if the pledge be not redeemed by reason of death or the like of the seller or donor, it may be redeemed by the buyer or donee, because a right equal to that of the former owner has been generated by the sale or gift. In such a case if a dispute arises as to the source of the right, then the buyer or other

be superior, being opposed to only one mode of proof.' P. V. Kane in his notes on this verse observes: 'This verse applies to a simple pledge or mortgage (gopyādhi) where there is no enjoyment. In such cases the transaction which is effected by writing is superior to one effected in the presence of witnesses only. But if a transaction be effected before witnesses and is accompanied with possession, then there being two modes of proof (oral evidence and possession) that transaction would be superior to one effected by writing but without possession. Vide Vi. V. 184. Compare Sec. 48 of the Indian Registration Act which confers priority on registered documents against oral agreements unless the latter are accompanied or followed by delivery of possession.' This verse along with Verse 517:

(Ādhim ekaṁ dvayor yas tu kuryāt kā pratipad bhavet/
Tayoḥ pūrvakṛtaṁ grāhyaṁ tatkartā coradaṇḍabhāk//)

shows that hypothecation without delivery of possession was known to Kātyāyana. *Kātyāyanasmṛtisāroddhāra*, (Poona, 1933) p. 219.

12. Vide Colebrooke's Digest, p. 221.
13. Halāyudha thus described the successive offices held by him under Lakṣmaṇasena in his *Brāhmaṇaṣarvasva*: (Ed. D. M. Bhaṭṭācārya.)

Bālye khyāpitarājapaṇḍitapadaḥ sitāṁśubimbojjvala
Chatrotsiktamahāmahattakapadaṁ datvā nave yauvane/
Yasmai yauvanaśeṣayogyam akhilakṣmāpālanārāyaṇaḥ
Śrīmān lakṣmaṇasenadevanṛpatir dharmādhikāraṁ dadau//V.12.

donee "(who is admitted as such) is required to prove his possession, and not the commencement of his title".[14] This passage among other things clearly shows that according to Raghunandana there could be a pledge without possession and that such a pledge was prevalent in his days. We may, therefore safely conclude that the system of hypothecating property without delivering possession of it to the creditor was prevalent in Bengal at least from the time of Sena kings, and it seems to me that there are reasons why such a form of mortgage should find a readier acceptance in Bengal than anywhere else. A pledge, as you have seen, may either be moveable or immovable. Now, in the case of movable property the transfer of possession from the debtor to the creditor may not cause much inconvenience, but in the case of immovable property it may often prove to be a source of inconvenience to both the parties; for the creditor, on the one hand, may often be unwillingly to undertake the truoble of cultivating or making other profitable use of the land, and the debtor also may, on the other hand, be diffident regarding the honesty or capacity of the creditor. It is, therefore, quite natural that in a province where pledges of immovable property frequently take place, the people should, sooner or later, hit upon the expedient of introducing a system of mortgage which would not require the debtor to part with possession of the property. Now, as I have already explained in another place, transfers of immovable property were likely to be more frequent in Bengal than anywhere else where the *Mitākṣarā* law with its peculiar restraints on alienation especially of immovable property prevailed, and the necessity for raising a loan and that speedily, would also be more frequent there by reason of the commercial activity of the people who settled along the lower course of the Ganges. It is, therefore quite natural that these circumstances should combine to produce

14. Evaṅ ca vikretṛdātror maraṇādinā ādhyanuddhāra vikrayadānābhyāṁ tatkartṛtulyasvatvajananāt tatra takretṛpratigṛhītṛbhyām ādhyuddhāraḥ kārya iti tatraivāgamavivāde tābhyāṁ tayor bhoga eva vyasasthāpanīyo nāgāmāder iti.

Dāyatattva. (Edn. L. K. Serma, Calcutta, 1828) p. 26.

a modification of the original law under which a pledge necessarily involved delivery of possession of the property pledged by the debtor to the creditor. I must not, however, be understood to say that hypothecation was unknown outside the province of Bengal; on the other hand there is clear evidence of its prevalence to be found in works regarded as authoritative in other provinces. Thus in *Vyāvahāramayūkha* Nīlakaṇṭha referring to a text of Bṛhaṣpati, in which the two words *ādhi* and *bandha* are used together so as to signify the different meanings must be attached to them, says that the word *bandha* may be taken to mean an agreement of this form, *viz.*, "I shall not make a gift, sale, pledge, or other disposition of this house or field, or other property until the debt I owe you is cleared off" ; and this is an explanation which clearly marks off a hypothecation from a pledge accompanied by possession, and supports the suggestion of Dr. Ghose that the word *bandhaka* as distinguished from *ādhi* was taken hold of to introduce a new kind of mortgage which gradually did away with the requirements of delivery of possession without which there could be no pledge under the older law.

Having thus shown that the later Hindu Law discloses the recognition of a form of mortgage which did not involve transfer of possession, I shall now attempt to trace the successive stages which led to this transition. I have stated that the word *bandhaka* has in many texts been used in the same way as *ādhi* to denote a pledge with the accompaniment of delivery of possession so that the two words may be taken as synonymous expressions. There is, however, a text of Bṛhaṣpati in which distinction seems to have been drawn between them in so far as it says that a creditor should give a loan either attested by a document or in the presence of witnesses after obtaining an *ādhi* or a *bandhaka* of adequate value or a reliable surety."[15] Here the use of the two words

15 Paripūrṇaṁ gṛhītvādhiṁ bandhaṁ vā sādhulagnakam/
Lekhyārūḍhaṁ sākṣimad vā ṛṇaṁ dadyād dhanī tathā//

Bṛhaspati, X. 5.

Vide here also a text of Hārīta of identical import quoted in the *Dharmakośa, Vyavahāra* section, 608. (Vol. 1—II).

ādhi and *bandhaka* conjunctively suggests that they are employed in different senses, and the *Vīramitrodaya* in explaining this quotes a text of Nārada which says that the word *bandha* signifies a property placed in the hands of a friend for the confidence of the creditor.[16] Now, it seems to me that this marks off the first stage in the transition from a pledge with delivery of possession to the creditor to a hypothecation in which the debtor retains the possession of the property, for here, although the debtor parts with his possession, it is not the creditor but somebody else in whose hands the property is placed in order that he may produce it in case the debtor cannot fulfil his engagement to pay off the debt. The next stage in the transition is reached when the third party who played the part of a stake-holder, so to say, is transformed into a surety for the production of the pledge when the creditor becomes entitled to demand its production. That this transformation did actually take place appears from the fact that while Yājñavalkya describes three classes of sureties, *viz.*, for appearance, for trust, and for payment,[17] other law-givers have noticed a distinct class of surety, *viz.*, a surety for the production of the pledge who is sometimes described as a surety for production of the debtor's property (*ṛṇīdravyārpaṇa-pratibhū*) and sometimes, more precisely, a surety for the production of the pledge taken (*gṛhītabandhopasthānapratibhū*.) I shall deal with these classifications more fully in a future lecture, but I simply mention them here to show that when a pledge was allowed to be placed in the possession of a third person instead of the creditor nothing was more natural than that, that person should gradually be permitted to exercise his discretion to keep in the possession of the debtor provided he took upon himself the responsibilitiy and risk of standing a surety for its production at the proper time and this was what actually took place in the Hindu Law. When we have reached this stage, it is not at all difficult to conceive that there should be a further relaxation and that ultimately the debtor should be allowed to retain the pledge in his possession on his own undertaking not to alienate

16. Nikṣepo mitrahastastho bandho viśvāsakaḥ smṛtaḥ.
17. Darśane pratyaye dāne prātibhāvyaṁ vidhīyate. *Yāj.* II. 53.

it in any way without being required to procure a surety to ensure the production of the pledge in case he failed to discharge his debt in proper time. When we arrive at this stage we get what is called hypothecation, and I have already shown that the later Hindu Law furnishes ample evidence of its recognition.

The above account of the way in which the necessity of making over the property pledged to the creditor was gradually shaken off furnishes a curious instance of the manner in which old order slowly changes yielding place to the new without abruptness and without any seeming compulsion, but moved and guided along the line of least resistance by the impetus supplied by the altered conditions of the society and the exigencies created thereby, and it is only one among numerous instances of gradual modification introduced into the Hindu Law in response to the demands of time and the growing necessity of the society. I, therefore, venture to affirm that the critic who pretends to see nothing in the Hindu Law but a stagnant mass of archaic rules knows not what he says, and shows that he himself has got a stagnant mind.

Having thus explained to you the nature of a pledge under the Hindu Law, I shall now shortly discuss the rights and obligations arising from the transaction. You will remember that a pledge may be either for a definite period or without any period previously fixed, and it may again be either for custody or for use. The incidents of a pledge vary according to its nature with reference to these distinctions. Thus in the case of a pledge given upon the definite understanding that it must be redeemed within a definite time, the pledgor loses his right to redeem if he fails to carry out his undertaking, and in this respect it does not make any difference whether the pledge was one for mere custody or for use. Where, however, no such period is fixed by contract, there if the pledge be merely for custody so that the pledgee cannot get anything out of it in satisfaction of his debt, the pledgor loses his right to redeem when the amount of interest accruing due reaches its extreme limit allowable under the Hindu Law, which usually happens when the debt doubles itself; for the Hindu Law does not orninarily allow accumulation of interest exceeding

the principal. The principle underlying this seems to be that a creditor should not be compelled to stay his hands when the debt ceases to carry interest while the pledge being merely for custody does not bring any satisfaction. In either case however, the law allows a period of grace which usually extends to two weeks, so that the debtor can get his property released by paying off the debt within that time, although he has failed to pay off the debt within the period fixed by the contract, or allowed the interest to accummulate upto the maximum limit.[18] On the other hand, where the pledge is for use and no period is fixed by contract upon the expiry of which the pledge shall be forfeited, there no forfeiture can take place, and the pledgor is free to redeem and get back the property at any time he likes.[19] Then again, there is a further distinction to be observed in regard to a pledge for use, for the pledgee may be let into possession either on the understanding that the usufruct shall be enjoyed in lieu of interest, or on the understanding that besides the interest the principal also shall be satisfied out of the usufruct. In the former case where the usufruct is enjoyed in lieu of interest, it will be the duty of the pledgor to pay off the principal either within the time limited by the contract, if there be any, or at any time he chooses, if there be no fixed time limit, in order to get back the property in his possession. In the later case where the principal also is to be satisfied out of the usufruct it follows from the very nature of the contract that there cannot be any

18. Hiraṇye dviguṇībhūte pūrṇe kāle kṛtevadhau/
Bandhakasya dhanī svāmī dvisaptāhaṁ pratīkṣya tu//
Tadantarā dhanaṁ dattvā ṛṇī bandham avāpnuyāt//
Bṛ. S, X. 48.
Sm, candrika. II. 330, and *Vivādaratnākara,* 31 attribute this to Vyāsa. Mitrāmiśra in his *Vyavahāraprakāśa,* p. 242. ascribes this to both.

19. Ādhiḥ praṇaśyed dviguṇe dhane yadi na mokṣyate/
Kāle kālakṛto naśyet phalabhogyo na naśyati// *Yāj,* II. 58.
Vijñāneśvara explains this as having reference to— *'akṛtakālagopyādhi'* :
Pāriśeṣāyd ādhiḥ praṇaśyed ity etad akṛtakālagopyādhiviṣayam avatiṣṭhati.

forfeiture, and the pledgor shall get back his property on the expiry of the term fixed by the contract, if there be any, or on the principal with interest being satisfied out of the usufruct, if there be none. This later class of usufructuary mortgage in which the debt is liquidated from the usufruct was popularly known as *kṣayādhi*[20] or a pledge that exhausts the debt, and, as Dr. Ghosh points out, it resembled in many points the *vivum vadium* of the old English Law. The *Mitākṣarā*, however, lays down a special rule on the authority of a text of Bṛhaspati that if in such a case after the pledgee has been let into possession of the property, it unexpectedly acquires an additional value or deteriorates from its previous condition then the increase or the decrease in the usufruct shall, in the absence of a contract to the contrary, be taken into account in estimating the amount payable to redeem the property, so that the debtor shall have to pay less than the principal in the one case and more than the principal in the other. Those, then, being the conditions for foreclosure, it follows that the pledgor is entitled to get back his property on the satisfaction of the amount payable by him at any time before the foreclosure becomes absolute on the expiry of the period of grace allowed by the law, and it is laid down that if the pledgee refuses to release the property in such a case he shall be liable to punishment as if he were a thief. There is, however, one exception to this rule, *viz.* that where a usufructuary mortgage is given upon the definite understanding that it will be redeemed at a particular time there it cannot be redeemed before the close of the term even if the debtor wishes to get back the property on paying the amount due to the creditor without waiting till the end of the term unless the creditor agrees to forego his strict rights to retain the property in his possession for the full period originally agreed upon.[21] It thus appears that the Hindu

20. Vijñāneśvara in his commentary on the *Yājñavalkyasaṁhitā* explains:

Sarvathā savṛddhikamūlarṇāpākaraṇārthādhyupabhogaviṣayam idaṁ vacanam, tam enaṁ Kṣayādhim ācakṣate laukikāḥ. Vij. on *Yāj.* II. 64.

21. On *Yāj.* II, 64:

Yadā tu dviguṇībhūtam ṛṇam ādhau tadā khalu/
Mocya ādhis tadutpanne praviṣṭe dviguṇe dhane//

Law, while protecting with care the rights of the mortgagor to get back his property at the proper time, cannot be accused of showing an undue indulgence to him so as to enable him to get out of the terms of the contract into which he entered with open eyes.

Those, then, being the conditions of foreclosure under the Hindu Law, it remains to be considered whether under that law the creditor could under any circumstances sell the property pledged in order to obtain satisfaction of his debt. It appears that under the Hindu Law, the right of sale was given to the pledgee as an exception to the right of foreclosure, that is to say, where, except in the case of a usufructuary mortgage without a fixed time limit which is incompatible with both a foreclosure and a sale, the creditor would otherwise be entitled to foreclose the mortgage, it would be open to him to sell the property mortgaged, if he were prevented from exercising the right of foreclosure by reason of a contract to that effect or

Vijñāneśvara refers to a text of Bṛhaspati and explains the same:
Etad eva spaṣṭīkṛtaṁ Bṛhaspatinā:

Ṛṇī bandham avāpnuyāt/
Phalabhogyaṁ pūrṇakālaṁ dattvā dravyaṁ tu sāmakam/
Yadi prakarṣitaṁ tat syāt tadā na dhanabhāg dhanī//
Ṛṇī ca na labhed bandhaṁ parasparamataṁ vinā//

Bṛhaspati, X. 72. cf. Vyāsa quoted by Nanda on *Viṣṇu*, VI. 7.

Asārthaḥ—phalaṁ bhogyaṁ yasyāsau phalabhogyaḥ, bandhaka ādhiḥ. Sa ca dvividhaḥ, savṛddhikamūlāpākaraṇārtho vṛddhimātrāpākarṇārthaś ca. Tatra ca savṛddhimūlāpākaraṇārthaṁ bandhaṁ pūrṇakālaṁ pūrṅaḥ kālo yasyāsau rūrṇakālaḥ tam āpnuyād ṛṇī. Yadā savṛddhikaṁ mūlaṁ phaladvāreṇa dhaninaḥ praviṣṭaṁ tadā bandham āpnuyād ity arthaḥ. Vṛddhimātrāpākaraṇārthaṁ tu bandhakaṁ sāmakaṁ dattvāpnuyād ṛṇī. Samaṁ mūlaṁ, samam eva sāmakam. Asyāpavādam āha: yadi prakarṣitaṁ tat syāt. Tad bandhakaṁ prakarṣitaṁ atiśayitam bṛddher apy adhikaphalaṁ yadi syāt 'tadā na dhanabhāg dhanī', sāmakaṁ na labheta dhanī. Mūlam adattvaiva ṛṇī bandham āpnuyād iti yāvat. Atha tv aprakarṣitaṁ tadbandhakaṁ vṛddhaye 'paryāptaṁ tadā sāmakaṁ dattvāpi bandhaṁ na labhetādhamarṇaḥ. Vṛddhiśeṣam api dattvaiva labhetety arthaḥ. Punar ubhayatrāpavādam āha—'parasparaṁ mataṁ vinā'. Uttamarṇādhamarṇayoḥ parasparānumatyabhāve 'yadi prakarṣitam' ityādy uktam, parasparānumatau tūtkṛṣṭam api bandhakaṁ yāvanmūladānaṁ tāvad upabhuṅkte dhanī, nikṛṣṭam api mūlamātradāne nāivādhamarṇo labhata iti.

some rule of law prohibiting a foreclosure and entitling the creditor to his money. There are two special kinds of pledges in which the law lays down that there can be no foreclosure and the creditor must take his money including such interest as he is entitled to. Those pledges are known as *caritra-bandhaka*[22] or pledges of good faith or according to another interpretation, pledges of religious merit; and *satyaṁkārakṛta*[23] or pledges of solemn promise. A pledge is said to be a pledge of good faith when there is a great difference between the value of the pledge and the money borrowed whether it be in favour of the creditor or in favour of the debtor, since such a pledge

22. This type of pledge has been mentioned by Yājñavalkya only in his text (II. 61). The implication of the same has been explained by Vijñāneśvara in the lines :

Dhaninaḥ svacchāśayatvāt bahumūlyam api dravyam ādhīkṛtyādha-marṇenālpam eva dravyam ātmasātkṛtaṁ, yadi vādhamarṇasya svacchāśayatvenālpamūlyam ādhiṁ gṛhītvā bahudravyam eva dhaninā adhamarṇādhīnaṁ kṛtam iti.

He states further : caritraśabdena gaṅgāsnāgnihotrādjanitam apūrvam ucyate. Yatra tad evādhīkṛtya yad dravyam ātmasātkṛtam.

Aparārka interprets the word *caritra* as *dharma* and Mitramiśra in his commentary refers to it as *puṇya.*

Devaṇabhaṭṭa in his *Smṛticandrikā* (II, 334-5) explains :

Caritram iṣṭāpūrtādiko dharmaḥ .....evaṁvidhe tv ādhau dhanam aprayacchato 'dhamarṇasya nāsty āṇṛṇyam ity abhiprāyaḥ.

Jagannātha in his *Vivādabhaṅgārṇava* explains the circumstances under which such a variety of pledge is possible :

Gaṅgāsnānādeḥ puṇyakarmaṇo bandhatvaṁ tadaiva bhavati yadi ṛṇinā ṛṇaṁ gṛhītvā ucyate yāvat tava dhanaṁ na śodhayāmi tāvat gaṅgāsnānaṁ na kariṣyāmīti.

Vivādabhaṅgārṇava, Folio, 108, L. 11-14 ; Col. Dig.I. 143.

It is further stated that : Atra tu gaṅgāsnānādika aupacārikago-pyādhir eva na bhogyādhiḥ. Ibid.

23. Satyaṁkārakṛta :

It is also a special variety of pledge mentioned by Yājñavalkya (II. 61). Vijñāneśvara presents the derivative meaning of the term thus :

Karaṇaṁ kāraḥ, satyasya kāraḥ satyaṁkāraḥ, satyaṁkāreṇa kṛtaṁ satyaṁkārakṛtam. Ayam abhisandhiḥ, yadā bandhakārpaṇasamaye evettham paribhāṣitaṁ dviguṇībhūte'pi dravye mayā dviguṇaṁ dravyaṁ eva dātavyaṁ nādhināśa iti tadā tad dviguṇaṁ dāpayet.

must be taken to have been given or taken in reliance upon the good faith of the creditor in the one case and of the debtor in the other. In a case of this description there will be no foreclosure, but the creditor will be entitled to sell the property pledged to recover his money at the proper time. The expression *caritrabandhaka* may also mean a pledge of religious merit whereby the debtor stipulates that he shall not perform a particular act of religious merit or if he performs it the benefit of it shall accrue to the creditor until he repays the debt. In such a case also there will be no forfeiture since a forfeiture does not amount to a fulfilment of the stipulation and the creditor shall take the money by the sale of the pledge, if any, given along with the stipulation. A pledge of solemn promise is a pledge given by the debtor with a solemn promise to repay the debt and not to allow the pledge to be taken in satisfaction of the debt. Here, also, there will be no foreclosure since the solemn promise mentioned above implies a contract that there will be no foreclosure ; in consequence, the creditor will be entitled to sell the pledge in case he eannot otherwise obtain satisfaction. The practical result of these rules, therefore is, that the right of sale arises, when in a case otherwise, fit for foreclosure, the right to foreclose is expressly or impliedly debarred by a contract between the parties, or where there is such a difference between the value of the pledge and the amount due to the creditor that it would entail great hardship either upon the creditor or upon the debtor to have the debt wiped off by the forfeiture of the pledge. It need hardly be said that it is laid down that where the pledge is sold and there remains a surplus after the satisfaction of the

Viśvarūpa however observes that in case of breach of promise there will be loss :

Satyaṁkāriṇas tu visaṁvādatas taddhānir eva.

Viśvarūpa on *Yāj*. II. 63 (T.S.S).

Jagannātha holds that in such a case pledge is not offered and conscience alone is the surety.

Yatra ṛṇinā bandhaḥ nārpitaḥ kiṁ tu ṛṇagrahaṇasamaye tenoktaṁ satyenābhibhāṣe tava ṛṇam avaśyaṁ śodhayiṣyāmīti tatra phalato dharma eva pratibhūr āsīd ity arthaḥ, p. 196.

Vivādabhaṅgārṇava F. 108, L. 38-41.

debt the debtor becomes entitled to the surplus, but it may be observed that our lawgivers do not expressly say anything about the liability of the debtor to make good the deficiency if the sale-proceeds do not fully satisfy the debt. With reference to this omission, Dr. Ghosh remarks, with his usual raciness, that, "like a similar omission in the English Pawn Brokers Act, it may be regarded as an indirect compliment to the proverbial shrewdness which establishes the kinship of the worthy brotherhood of money lenders all the world over". As regards the method of carrying out the sale, the creditor must of course give due notice of his intention to the debtor, but if he is dead or cannot be found then the creditor has the power to sell the pledge even in his absence, in the presence of witnesses, or may keep it at a public place for ten days after having fixed the price. If within that time the debtor does not come forward and discharge the debt, then the creditor shall have his debt satisfied out of it and the surplus if any, shall be made over to the debtor's kindreds or in their absence to the King[24]. Kātyāyana, however, says that in such a case the creditor should sell the pledge after producing the pledge before the king and obtaining his permission and the surplus sale-poceeds will remain with the king for the benefit of the debtor.[25] You will thus see that the Hindu Law does not omit to lay down rules for the proper conduct of the sale to ensure that the interest of the debtor may not be unjustly

24. Hiraṇye dviguṇībhūte mṛte naṣṭe 'dhamarṇake/
Dravyaṁ tadīyaṁ saṁgṛhya vikrīṇīta sasākṣikam// *Bṛhaspati*, X.51.
Rakṣed vā kṛtamūlyaṁ tu daśāhaṁ janasaṁsadi/
Ṛṇānurūpaṁ parato gṛhītvānyat tu varjayet// *Ibid.* X. 52.
Also note a provision by Bṛhaspati in this context :
Svadhanaṁ tu sthirīkṛtya gaṇanākuśalair nṛbhiḥ/
Tadbandhujñātividitaṁ pragṛhṇann nāparādhnuāt// Ibid. X.55.
Vide here the notes by L. Renou in *Et, V. E. P.* XI. (1963) on the *Bṛhaspatismṛti*, X. 48, 52, 55.
25. Ādhātā yatra na syāt tu dhanī bandhaṁ nivedayet/
Rājñas tataḥ sa vikhyāto vikreya iti dhāraṇā//
Savṛddhikaṁ gṛhitvā tu śeṣaṁ rājany athārpayet// Kātyāyana, 529.
For other details regarding the procedure of sale of the pledge vide Chatterjee, Law of Debt, pp. 287-291.

sacrificed to serve the purpose of the creditor. As regards the time when the right of sale becomes capable of being exercised, it is the same as in the case of foreclosure and I need not repeat the rules which I have already explained in that connection.

You will observe from the rights of the mortgagee noticed above that the giving of a pledge created a real right and also furnished what is called a real security. It created a real right because the creditor when a pledge was given became invested with an interest in the property pledged which under certain conditions and on the expiry of a certain period would either ripen into full ownership or entitle him to sell the property without the concurrence of the debtor. This right, therefore, is a right in the property itself as distinguished from the right corresponding to the debtor's personal liability to pay. The *Mitākṣarā* expressly supports this position when it says that "the giving of a pledge is well-recognised among the people as a conditional cause of extinction of property, and the acceptance of a pledge as a conditional cause of acquisition of property, so that after the debt has doubled or the stipulated time has arrived the right to satisfy the debt ceased, and by virtue of the text of Yājñavalkya which is being commented upon the debtor's right is extinguished for ever, and the creditor's ownership becomes absolute".[26] So also the security furnished by a pledge under the Hindu Law was what is called a real security, for it not only operated upon the will of the debtor to induce him to pay off the debt in so far as he was kept out of possession of the property given in pledge, or at all events restrained from making free dispositions of it so long as the debt was not discharged, but it, at the same time, placed in the hands of the creditor sufficient tangible means of obtaining satisfaction quite independent of the wishes or ability of the debtor. A security, as far as one can see, may become a real or substantial security to the

26. Ādhīkaraṇam eva loke sopādhikasvatvanivṛttihetuḥ ādhisvīkāraś ca sopādhikasvatvāpattihetuḥ prasiddhaḥ. Tatra dhanadvaiguṇye nirūpitakālaprāptau ca dravyadānasyātyantanivṛttir anena vacanenādhamarṇasyātyantikī svatvanivṛttiḥ uttamarṇasya cātyantikaṁ svatvaṁ bhavati.
Vijñāneśvara on *Yāj*, II. 58.

creditor in three ways: (i) through authority to enjoy, (ii) through authority to foreclose, and (iii) through authority to sell, and it has been shown that all these authorities were recognised and conferred by the Hindu Law upon pledges in proper cases according to the intention of the parties and the nature of the pledge. That this was the state of Hindu Law in its more developed form admits of no doubt whatsoever, but it has been supposed that in the days of Manu the pledgee had no more than a bare right of detention, and reliance is placed in support of this position upon the text of Manu, 'however long the time may be neither an assignment nor a sale of pledge can be made'.[27] This however, is explained by the *Mitākṣarā* with reference to the context to refer to a pledge for use, and I cannot say that the interpretation is far-fetched and unreasonable.

It appears that the pledgee had also a right to create a sub-mortgage[28], and the *Vīramitrodaya* says that this would follow *a fortiori* from the existences of the right to sell, for a creditor having right to sell would only be acting with leniency if he were to realise his money by creating a sub-mortgage. It, however, lays down on the authority of a text of Prajāpati[29] that a sub-mortgage cannot be created for more than the principal money due by the debtor. The reason for this rule seems to be that otherwise the sub-mortgagee might become entitled to demand more upon his mortgage than what the mortgagee could demand from the mortgagor by reason

27. Na cādheḥ kālasaṁrodhān nisargo'sti na vikrayaḥ. Manu, VII.143. In the *Mitākṣarā* (on *Yāj.* II.58) it is explained as:

Bhogyasyādheḥ cirakālāvasthāne'py ādhīkaraṇavikrayaniṣedhena dhaninaḥ svatvaṁ nāstīti.

28. The term that is used to indicate sub-mortgage is 'anvādhi' (Sm. C. II.334). It should be noted that Kauṭilya while applying the rules of deposit to the case of pledge—does not accord approval to the act of sub-mortgage by the pledgee. This is evident from the provision of penalty in his text:

Ādhānavikrayāpavyayaneṣu caturguṇapañcabandho daṇḍaḥ.

Arthaśāstra, III.12.6.

29. Dhanī dhanena tenaiva param ādhiṁ nayed yadi/
Kṛtvā tadādhilikhitaṁ pūrvaṁ vāsya samarpayet//

Q. in *Vyavahāraprakāśa*, p. 244.

of the rule and the Hindu Law prohibiting accumulation of interest beyond a certain limit bearing a certain proportion to the principal, usually equal to it, so that there would arise a conflict between the rights of the mortgagor and the sub-mortgagee. I may, however, mention that Medhātithi[30] and Govindarāja in their commentaries on the *Institutes of Manu* seem to throw a doubt on the right of a mortgagee to create a sub-mortgage on the authority of the text of Manu quoted above. I have already cited the interpretation put by the *Mitākṣarā* upon the text which gets rid of the objection by

30. The question of sub-mortgage in the directive of Manu arises out of the use of the word *Nisarga* in VIII. 143, which in the same form finds place in the text of Nārada, IV.129. Asahāya the oldest of the commentators on *Nārada* uses the word in the sense of gift: 'na tasya kvacid dānam asti.'

Medhātithi first interprets it as transference to another according to regular procedure:

Anyatra vidhinārpaṇaṁ nisargaḥ. He states further: Iha nisargo-'nyatrādhānaṁ vikrayasāhacaryāt. He goes on: etad eva prasutya na syātāṁ vikrayādhāne iti smṛtyantare paṭhitam.

It may be mentioned here that Medhātithi speaks of and perhaps permits sub-mortgage by the pledgee with the consent of the pledgor for realising his loan:

yathā tadīyaṁ bandhakaṁ tadanujñayōttamarṇenānyatrādhāya sva-dhanaṁ gṛhyate.

According to Vijñāneśvara the term 'nisarga' stands for 'anyatrādhī-karaṇam'—sub-mortgage. on *Yāj.* II.58.

Govindarāja: ......na cānyatra bandhavetanatvenārtham asti.

Com. on *Manu*, VIII.143.

Vide also Lakṣmīdhara in his *Kṛtyakalpataru*, Vyavahārakāṇḍa, 298.

Devaṇabhaṭṭa is in favour of sub-mortgage and in that context refers to the text of Prajāpati: Anyatra tv ādhīkaraṇaṁ asmin viṣaye na viruddham, yad āha Prajāpatiḥ:

Dhanī dhanena tenaiva param ādhiṁ nayed yadi/
Kṛtvā tad ādhilikhitaṁ pūrvaṁ cāsya samarpayet//......

Kiṁ tu mūlamātram evānyatrādhīkṛtyādeyaṁ na tu savṛddhikam.

Smṛticandrikā, II, 333-4.

Kullūkabhaṭṭa: Atra tu sarvadeśīyaśiṣṭācāravirodhaḥ bandhakībhūta-bhūmyāder anyatrādhīkaraṇasamācārāt. on *Manu*, VIII.143.

It may be mentioned in this context that Mādhava in his independent commentary on the *Parāśara* speaks of sub-mortgage as *Vastvādhi*. p. 182.

He states further: Ayaṁ vastvādhir dhanasya dvaiguṇye sati, sam-pratipattau tu dvaiguṇyād arvāg api draṣṭavyaḥ. Ibid. p. 182.

limiting its application to the case of a usufructuary mortgage. I may also mention that Kullūkabhaṭṭa, another principal commentator on the *Institutes of Manu*, observes that the interpretation of Medhātithi and Govindarāja is contrary to the approved usage in all the provinces, since it is usual to mortgage land and other properties mortgaged at another place. It may be noticed that the pledgee has the right to demand fresh security or in the alternative, payment of the mortgage debt on the determination, loss or destruction of the pledge without the fault of the pledgee owing, as our

Jagannāthā discusses the position as to what should be the right procedure in the case where the pledgee places under sub-mortgage the pledged land and takes a loan, while the pledgor turns up to redeem it:

Etanmate bandhakībhūtakṣetrādikam anyatra bandhaṁ kṛtva ṛṇaṁ yadi gṛhṇāti uttamarṇas tadā uttamarṇasyaiva daivavaśāt ṛṇapariśodhanāsāmarthye adhamarṇe ca ādhiṁ mocayitum āgate kā vyavasthā syād ity atra viśadīkṛtya ucyate, yadi gopyādhiḥ punar ādhikṛtaḥ, ṛṇaṁ ca pūrvaṛṇān nyūnaṁ tulyaṁ vā tadā adhamarṇaśodhitadhanenaiva śodhanaṁ kṛtvā ādhiṁ mocayitvā adhamarṇāya samarpayet. Adhikaṁ ṛṇaṁ gṛhītva tu punar ādhir na kartavyaḥ.

Vivādabhaṅgārṇava, Folio. 99. Lines 35-42 and Folio, 100, lines 1-3; Col. Digest, 1.134.

Jagannātha interestingly raises several points which deserve mention here: Yadi tu bhogyādhiḥ tadā pratijñādvayāvirodhenaiva ādhīkartavyaḥ, yathā pūrvādhamarṇena yāvan mūladhanaṁ na śodhayāmi tāvad bandho bhujyatām ity uktaṁ tadā pūrvottamarṇenāpi tad evoktvā bandho dātavyaḥ na tu varṣadaśakaṁ bhujyatām ityādi.

Ibid. F. 100, L. 3-7; Col. Dig. 1. 134.

Jagannātha expresses the view that the pledgee becomes liable to be penalised if he mortgages it to a second party on a dissimilar agreement:

Vastutas tu svagṛhītādheḥ punar anyatra visadṛśapratijñayā ādhīkaraṇe pūrvottamarṇasya daṇḍa eva bhavatīti dhyeyam

Ibid. Lines, 11-13. Col. Dig. 1.135.

According to him sub-mortgage is not totally prohibited:

Sarvatrādhānaṁ na niṣiddham, yathā yāvan mūlaṁ na śodhayāmi tāvad bandha bhujyatām iti niyamena bandhaṁ dattvā ṛṇaṁ kṛtavān, punaḥ katipayadivasavarṣsānantraṁ adhamarṇaṁ ṛṇam ayācata uttamarṇaḥ, sa ṛṇaṁ śodhayitum aśaktas tadā uttamarṇas tu tādṛśapratijñayaiva bandhaṁ dattvā anyatra tāvad eva dhanaṁ ṛṇaṁ kṛtavān ityādivyavhāradarśanād iti kramaḥ. Ibid. F. 101. L. 22-28; Col. Dig. 1. 136.

For detailed study of the topic vide, Chatterjee, *The Law of Debt*, pp. 256-260.

lawgivers put it, to an act of the king or an act of God,[31] and the *Vīramitrodaya* here puts a note to explain that an act of the king means a wanton act of oppression proceeding from the king not due to any fault of the creditor. As Dr. Ghose remarks, our lawgivers appear to "speak somewhat bluntly of the acts of the king and not of the king's enemies, probably because the casuistry which treats the king's own acts as those of his enemies was too subtle for the unsophisticated Hindu Jurist," and he compares this rule with that to be found in Article 2131 of the French code which says : "In like manner in the present movables or immovables, subjected to mortgage, have perished or sustained deterioration in such manner that they have become insufficient for the security of the creditor, the latter shall be permitted either to sue immediately for repayment or to obtain an additional mortgage". It may also be compared with the provisions of Section 68 of the Transfer of Property Act which lays down : 'where by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in Section 66, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and if the mortgagor fails so to do, may sue him for the mortgage-money". The wonder is how the human reason bridges over the gulf of time and space and arrives at similar results by a process which is entirely its own.

Having passed under review the various rights of the pledgee under the Hindu Law I shall now say a few words

31. Daivarājopaghātena yatrādhir nāśam āpnuyāt/
Tatrānyad dāpayed bandhaṁ śodhayed vā dhanam ṛṇī//
Bṛhaspati, X. 41.
For different readings vide. *Bṛhaspatismṛti*. (G. OS). pp. 105.
Vīr : Rājopaghāto'tra ucchṛṅkhalena rājñā kṛta upadravaḥ, na tu dhanikāparādhanimittakaḥ. *Vyavahāraprakāśa* p. 237.
Vyāsa also has similar provision : Daivarājopaghāte tu na doṣo dhaninaḥ kvacit. Quoted in *Vīr. Vy*, p. 237.
Kātyayana : Na ced dhanikadoṣeṇa nispated vā mriyeta vā/
Ādhim anyaṁ sa dāpyaḥ syād ṛṇān mucyeta narṇikaḥ//
Verse, 524.

about his duties towards the pledgor. Shortly stated, they may be described as (i) duty to use proper care in keeping and using the pledge, (ii) duty not to use and enjoy the pledge when it has been given merely for custody, and (iii) duty to return the pledge on satisfaction of the debt either out of the usufruct or from payment made by the pledgor. If the pledgee out of negligence spoils or destroys the thing placed under his care, then it will be his duty to make good the loss by restoring the thing to its former condition in the first case and by returning its price in the second, and if the pledge were for use so that the interest were to be satisfied out of it, then the pledgee would not be able to claim any interest from the pledgor by reason of the deterioration or destuction of the pledge, for he was himself responsible for it. Then, again, when the pledge has been totally destroyed, the pledgee cannot claim the principal without paying the price of the pledge as a compensation, and in a case where the pledge is very valuable, so as to be more precious than the principal and the interest payable to the pledgee put together, the pledgor may even claim the balance. When the pledgee in violation of the compact uses a pledge placed in his hands merely for custody it will work a forfeiture of the interest, and the *Mitākṣarā* takes care to note that this will happen although the interest may exceed the usufruct because the pledgee has infringed the compact.[32] As regards the duty to return the pledge when the debt has been paid off, I dealt with it before ; I may here add that if the pledgee be absent then the debtor is to pay the money to the members of his family, and take back the pledge from them ; if, however, no person be available who can return the pledge, then the money being tendered, the interest will cease to run.

32. Gopyādhibhoge no vṛddhiḥ sopakāre'tha hāpite/
Naṣṭe deyo vinaṣṭaś ca daivarājakṛtād ṛte// *Yāj.* II.59.

Vijñāneśvara in his commentary adds: Gopyādhes tāmrakaṭāhādeḥ upabhoge na vṛddhir bhavati. Alpe'py upabhoge mahaty api vṛddhir hātavyā, samayātikramāt.

For a discussion on this point vide, Chatterjee. *The Law of Debt*, p. 227.

The next question to which I will advert relates to the right of the pledgor to sell or mortgage the pledge. As the ownership of the pledgor is not affected by his giving the property in pledge, it follows that he can sell it subject to the rights of the pledgee. In such a sale the purchaser steps into the shoes of the pledgor and can redeem the pledge as his vendor could have done. If any authority were needed, the passage I have quoted from the *Dāyattattva* is an express authority on this point. As regards the right to create a second mortgage it seems to me that it did not exist at best under the earlier Hindu Law, and that would be so, because as I have already pointed out, the earlier Hindu Law did not recognise a pledge which did not involve delivery of possession, and one thing could not be placed in possession of two persons. Hence Kātyāyana declares that if a person pledges a property to two individuals, then the first transaction shall prevail and the pledgor shall be punishable like a thief[33] and text of Viṣṇu prescribes the nature of punishment to be inflicted on the offending pledgor. Referring to the latter test Dr. Ghosh observes that the test seems only to point to a fraudulent second mortgage executed by the debtor without disclosing the first mortgage, and that no exception could be taken to the second mortgage honestly created by the debtor. It must, however, be observed that under the Hindu Law so long as it required possession to be delivered to the pledgee, a debtor could not possibly create a second mortgage with honesty except with the connivance and consent of the first mortgagee and hence the texts penalising the creation of a second mortgage are found to be general in their terms, without any qualifications and thus indicate the invalidity of such a transaction. That this was the *Mitākṣarā* view appears from a passage in which the author commenting upon the text of

33. Ādhim ekaṁ dvayor yas tu kuryāt kā pratipad bhavet/
Tayoḥ pūrvakṛtaṁ grāhyaṁ tatkartā cauradaṇḍabhāk//
Kātyāyana, 517.

The word underlined has been explained in the *Smṛticandrikā* as: ṛṇagrahaṇopakramatvād ādhikriyā pratipad ity ucyate. II.337. In the *Vivādaratnākara* this has been explained as *vyavasthā*. p. 35.

Yājñavalkya, "in the case of a pledge, an acceptance of a gift, or a purchase, the prior in time prevails"[34] says; "if it is to be said that this text is superfluous because when a property has been pledged, the owner's right in it (to pledge it again) being wanting a second pledge is impossible, and that similarly of a property either given or sold, no second gift or sale can be validly made, it is answered that this is no real objection because the text is really founded upon reason to show that if a person by reason of a clouded intellect or greed creates a second mortgage, etc., although he has no right to do so, then the first shall prevail". This shows that, according to the *Mitākṣarā*, since after the creation of the first mortgage the mortgagor ceases to have the right to create a second, the second mortgage created without the right, cannot be valid. It may, however, be that when in course of time the necessity of delivery of possession came to be dispensed with, the creation of a second mortgage ceased to be amenable to the same objections as before and gradually came to be regarded as valid subject to the superior rights of the first mortgagee, and it may be contended, that when a gift or a sale of mortgaged property subject to the mortgage was regarded as valid, as appears from the passage quoted from the *Dāyatattva* of Raghunandana, it would follow *a fortiori* that a second mortgage could not be treated as invalid. I feel that these considerations raise a presumption that a second mortgage was gradually recognised as valid under the Hindu Law, but I must confess that I cannot be quite sure about this when I find that the *Vīramitrodaya* which is a comparatively modern work says: where a person having pledged a field to one, on taking a loan from him, again takes a loan from another on pledging the same property, there the field shall be held (under mortgage) by the first person, and not by the

34. Ādhau pratigrahe krīte pūrvā tu balavattarā. *Yāj.* II.23.
In his interpretation Vijñāneśvara holds: Nanv āhitasya tadānīm asvatvāt punar ādhānam eva na sambhavati; evaṁ dattasya krītasya ca dānakrayau nopapadyete, tasmād idaṁ vacanaṁ anarthakam—ucyate, asvatve'pi yadi mohāt kaścil lobhād vā punar ādhānādikaṁ karoti tatra pūrvaṁ balavad iti nyāyamūlam evedaṁ vacanam ity acodyam.

second ; and a similar rule shall apply to an acceptance of a gift and a purchase, the reason being the obstruction of ownership (in the case of a pledge) and the removal of ownership (in the other cases) due to the completion of the previous transaction."[35] It is, therefore, not unlikely that the difficulties of adjusting the rights of successive mortgages which prove so embarrassing to an English lawyer was unknown to the Hindu lawyers who insisted on the much simpler rule that a second mortgage created without redeeming the first could not be valid. Of course, if the first mortgagee were to be paid off out of the money raised on the second mortgage, there would be no difficulty, since in that case the second mortgage would practically be the first, but if the debtor were not so disposed there would not be much injustice in debarring him from creating a second mortgage at all. At all events it would save the court from a good deal of confusion if not prevent a good deal of fraud.

I shall now turn to the rules laid down in the Hindu Law to determine which among several mortgages should prevail. The general rule of course is that in the case of pledges just as in other transfers, the first in time prevails. But then there is this peculiarity in the case of pledges, that the priority in point of time is of no avail if the prior mortgagee has not obtained possession while the subsequent mortgagee has done. So the the *Vīramitrodaya* says: "if an unrighteous debtor obtains

35. Ekam eva kṣetram ekasyādhiṁ kṛtvā kim api gṛhītvā punar anyasyādhiṁ kṛtvā kim api gṛhṇāti tatra pūrvasyaiva tat kṣetraṁ bhavati nottarasyety arthaḥ. Evaṁ pratigrahe kraye ca yojanīyam svāmitva-pratibandhāvagamābhyāṁ prāg eva pūrvasyāḥ kriyāyāḥ kṛtatvād iti bhāvaḥ.

Etad evābhipretya Vasiṣṭho'py āha,

Yaḥ purvataram ādhāya vikriṇīte tu taṁ punaḥ/
Kim etayor balīyaḥ syāt prāktanaṁ balavattaram// iti

Ādhyādīnāṁ yaugapadye'py āha sa eva :

Kṛtaṁ yatraikadivase dānam ādhānavikrayam/
Trayāṇām iti sambandhe kathaṁ tatra vidhiṁ nayet//
Trayo'pi taddhanaṁ dharmyaṁ vibhajoyur yathāṁśataḥ/
Ubhau kriyānusāreṇa vibhāgeṇa pratigrahī// iti

Vīr. Vy. Pr. pp. 241-42

loans from two creditors by pledging the some property, then the priority shall be determined be reference to possession." So says Viṣṇu : "If two men to whom the same property has been pledged enter into a contest, he shall win who has obtained possession if it were not obtained by force."[36] Dr. Ghose, however, supposes that in the *Mitākṣarā* 'priority is determined not by possession, but by the order in which the mortgages have been made, possession by the mortgagee being material only when it cannot be ascertained which of two competing mortgages was prior in order of time'. I venture to presume that he says so on the authority of the passage in *Mitākṣarā* which I have already quoted from his book in a previous part of my discussion, and as I have there attempted to show that the passage had reference to a transfer of ownership, by a gift or a sale, and not to a pledge at all. I hope I shall be able to settle this point by referring to you to the passage in the *Mitākṣarā* which directly deals with the question of priority of pledges and appears to be in agreement with the rule quoted by me from *Vīramitrodaya*. Commenting upon the text of Yājñavalkya "By the acceptance of a pledge is its validity maintained," Vijñāneśvara observes as follows : "The taking of a pledge becomes complete by its acceptance which means enjoyment, whether it be a pledge for use or for custody not by mere witnesses or document nor by mere intention. Thus Nārada says, 'Pledges are declared to be of two sorts, immovable and movable, and both are valid when there is actual enjoyment, and not otherwise'. The result of this is as follows : it has been said that, 'in the case of a pledge, an acceptance or a purchase, the prior prevails', here the transaction ending in acceptance (as explained above) being prior, prevails, but if it be wanting in acceptance then although prior, it does not prevail." To obviate possible mistakes I should mention that the word enjoyment used in this connection is explained by

36. Ata eva dvayor dhanikayor duṣṭādhamarṇikena ekasya vastuna ādhīkaraṇe bhogān nirṇaya ity āha, Viṣṇuḥ,

Yayor nịkṣipta ādhis tau vivadetāṁ yadā narau/
Yasya bhuktir jayas tasya balātkāraṁ vinā kṛtā//

Vyavahāraprakāśa, p. 239.

the *Vīramitrodaya* to mean bringing under one's own control in the case of a pledge for custody and enjoyment of the usufruct in the case of a pledge for use.[37] Similarly Aparārka explains that it extends to the enjoyment of the usufruct in the case of a pledge for use and to putting it into the store-room in the case of a pledge for custody.[38] It is, therefore, clear that according to the *Mitākṣarā*, priority of the mortgage without possession is of no avail if the subsequent mortgage succeeds first in getting possession provided it was obtained without force or fraud. The fact is that the Hindu lawyers of the *Mitākṣarā* School never went so far as to hold that in the case of a pledge the delivery of possession was immaterial even for the purpose of determining priority between two transactions. It is also laid down that when two pledges are created contemporaneously then he who first obtains possessions secures the better title. This is similar to the rule of the Roman Law noticed by Dr. Ghosh under which if a debtor pledges his property to two persons at the same time and one of them happened to be in possesion he could claim preference over the others. If, however, in such a case both come to take possession during the same day, then they must divide the pledge among them. When these considerations do not arise, there are certain special rules laid down to determine the priority between the two transactions. Thus a mortgage created by a document is declared fit to prevail over a parol mortgage merely supported by witnesses, and even among mortgages created by documents, the document in which the mortgaged property is clearly defined prevails over one in which it is not so defined and is consequently left as imperceptible as the subtle element. If these special considerations do not apply, the general rule will, of course, hold good and the mortagage which is prior in point of time must prevail.

37. Gopyādhau bhogaḥ svikāraḥ bhogyādhau phalabhogaḥ.

Vya. pra. p. 239.

38. Svīkaraṇaṁ ca bhogyādhau bhogaparyantaṁ gopyādhau tu bhāṇḍāgārapraveśaparyantam.

Aparārka's commentary on *Yāj*, II. 60.

I will, now, conclude my review of the Hindu Law of Pledge. It would no doubt be interesting to compare with this the Law of Mortgage in some of the Western systems, but as the lecture has already become long I cannot permit myself any such lengthy digression at this place. I may, however, venture to affirm that the Hindu Law of pledge is on the whole eminently logical and reasonable, and I hope that whoever will study it with care, and without prejudice due to preconceived ideas which often blur the vision of able but unsympathetic readers, will be disposed to agree with Dr. Ghose that it is "a model of good sense and logical consistency." Nay, I may go further and say that whatever its imperfections may be, we need not be ashamed to place it side by side with any system of law bearing upon the subject.[39]

39. The topic on Pledge has in it different questions which have not been discussed by the author. It will be of special interest for the serious reader to refer to the *Law of Debt in Ancient India*, chap. V. pp. 205-297. Specifically the following sections deserve attention: I) Kuttā—a customary type of pledge, pp. 228-230; II) Pledge, possession and adverse possession, pp. 238-245; III) Pledge and ownership, pp. 245-256; IV): The redemption of the pledge, pp. 277-287; V) Epigraphic and other evidences of pledge, pp. 291-295. For general information reference may be made to chap. IV—Pledge, pp. 109-152 of *Juridical Studies in Ancient Indian Law* by L. Sternbach.

LECTURE VII

THE LAW OF BAILMENTS AND OTHER INCORPOREAL RIGHTS

How a bailment differs from a pledge—why the subject is treated here as a part of the law of things—Sir William Jones on the Hindu Law of Bailments—Different kinds of bailments—Grounds of bailee's obligations—Duties of the bailee—Duty to take proper care—Measure of proper care according to the Hindu law—the usual test—Bailee not responsible for loss arising from an act of the king or an act of God—Theft placed in the same category as an act of God—Bailee not exonerated when apparent excuse was created by him by fraudulent devices—As regards the quantum of care required, it made no difference whether the bailment was gratuitous or it was a loan for use—A special rule applicable to a bailment for mere custody—The general rule summarised—Some distinction drawn by the Roman law not recognised by the Hindu law—Rules of the Hindu law compared with the provisions of the Roman law, and the former sought to be justified—Provisions of the English Common Law compared—Different degrees of blameworthiness and different standards of compensation based thereon—Measure of compensation in each case—Punishment for breach of trust—Duty to return the deposit on demand—After demand, bailee responsible for loss however it may arise—Exception to the obligation to return on demand—A similar rule in the Roman Law—An exception to the exception—Special rules regarding a deposit with an artist—The manner of returning a deposit—Duty to return to the bailor, and not to any other claimant—Compare bailor's estoppel—Bailor being dead, the thing may be returned to his heirs—ordinarily the bailee may return the deposit whenever he chooses—Exception to this rule—Duties how enforced by the king—Some incorporeal rights—Right of pasturage—Land set apart for pasturage by the common consent of the villagers or by a special order of the king—Extent of pasturage-ground—It was kept in the form of a belt or enclosure around the village—Sir Henry Maine's view that it furnishes an indication of communal ownership—The explanation given by Yājñavalkya presupposes individual ownership—Conclusion—Right of way—Private way and public way—Evidence of the recogintion of private right of way—Three kinds of public way—Duty not to obstruct a public way—Some other incorporeal rights appurtenant to a tenement, and regulating relations between owners of adjacent lands—Certain peculiar interferences with another's proprietary right allowed

by the Hindu Law—Digging well and raising embankment on another's field—Cultivation of another's land, the owner being dead, long absent, or otherwise unable to till it—Right to take fuel or fruit from trees not enclos d.

IN THE present lecture I propose to deal with the Hindu Law of bailments and other incorporeal rights not already discussed. A bailment differs from a pledge in so far as in the case of a bailment property belonging to a person is placed under the control of another out of trust reposed in that person and not as a security for the performance of any obligation cast upon the owner. It follows from this that the rights of a bailee over the thing bailed are much more limited than the rights of a pledgee over the pledge since those peculiar rights which arise from the relation of creditor and debtor in the latter case cannot arise in the former. Still it cannot be denied that the bailee does, by the act of bailment, acquire certain rights over the thing placed uhder his custody, and it is because these rights constitute what a Hindu lawyer would call qualified property appropriate for keeping the thing in safe custody (*rakṣaṇopayogisvatva*) that I propose to discuss the subject at this place as a part of the law of things instead of postponing its discussion to give it a place in the law of contract.

Speaking of the Hindu law of bailments, Sir William Jones, who being an accomplished lawyer as well as a Sanskritist, was comptent to express an opinion on the subject, has said : "It is pleasing to remark the similarity, or rather identity, of those conclusions, which pure unbiased reason in all ages and nations seldom fails to draw, in such judicial enquiries as are not fettered and manacled by *positive* institution ; and although the rules of *pundits* concerning *succession to property*, the *punishment of offences*, and the *ceremonies of religion* are widely different from ours, yet in the great system of *contracts*, and in the common intercourse between man and man, the *Pootee* of the Indians and Digest of the Romans are by no means dissimilar." The truth of these remarks will, I hope, appear from the following short account of the Hindu law of bailments.

There are several kinds of bailments mentioned by our law-givers, but their incidents are almost identical. The word *nikṣepa* and *nyāsa* are often used to denote bailments in general, but they have also been used to denote special kinds of deposits. Thus the word *nikṣepa* in its special sense means an open deposit made in the presence of the bailee after showing him the nature and quantity of the thing deposited.[1] The word *nyāsa* signifies an open and ascertained deposit entrusted in the absence of the bailee with the members of his family.[2] The word *upanidhi*, on the other hand, means a deposit under a sealed cover of which the nature is consequently not disclosed to the bailee.[3] Besides these, there is the term *anvāhita*[4]

1. Asaṁkhyātaṁ avijñātaṁ samudraṁ yan nidhīyate/
Tad jāniyād upanidhiṁ nikṣepaṁ gaṇitaṁ viduḥ//
Nārada, Quoted in *Mit.* on *Yāj.* II.65.

vide also *Mit.* on *Yāj.* II.67 : samakṣaṁ tu samarpaṇaṁ nikṣepaḥ
Vide also *Nārada*, II. 1 :
Svaṁ dravyaṁ yatra viśrambhān nikṣipyty aviśaṅkitaḥ/
Nikṣepo nāma tat proktaṁ vyavahārapadaṁ budhaiḥ//
Bhavasvāmī gives the etymology : Niḥśaṁkaṁ nikṣipyate sthāpyata iti nikṣepaḥ.

2. Vijñāneśvara explains *Nyāsa* as : Nyāso nāma gṛhasvāmine adarśavitvā tatparokṣam eva gṛhajanahaste prakṣepo gṛhasvāmine samarpaṇīyam iti. on *Yāj.* II. 67.

Bṛhaspati speaks of the motive behind *Nyāsa* in the following verse :
Rājacaurārātibhayād dāyādānāṁ ca vañcanāt/
Sthāpyate 'nyagṛhe dravyaṁ nyāsas tat parikīrtitam// XI. 3.

3. Yājñavalkya defines it in the following way :
Vāsanastham anākhyāya haste 'nyasya yad arpyate/
Dravyaṁ tad aupanidhikaṁ pratideyaṁ tathaiva tat// II.6

Nārada : Anyadravyavyavahitaṁ dravyam avyāhṛtaṁ ca yat/
Nikṣipyate paragṛhe tad aupanidhikaṁ smṛtam// II.5.

Bṛhaspati : Anākhyātaṁ vyavahitaṁ asaṁkhyātam adarśitam/
Mudrāṅkitaṁ ca yad dattaṁ tad aupanidhikaṁ smṛtam//

Medhātithi states that it is better to accept *Upanidhi* in the sense of what was given for use through friendliness and favour.

4. Kātyāyana has classified this among *Upanidhi* (502). Bṛhaspati while regulating the problem of sale without ownership, mentions *Anvāhita* in addition to *Nyāsa* and *Nikṣepa.* Vijñāneśvara defines it as : yad ekasya haste nihitaṁ dravyaṁ tenāpy anu paścād anyahaste svāmine dehīti nihitaṁ tad anvāhitam. (on *Yāj.* II 67)

which means a bailment for delivery, that is to say, a deposit made over by the depository to another saying 'a certain person deposited this with me, and you shall deliver it to him, *yācitaka*[5] which means a loan for use, *śilpinyāsa*[6] which means a deposit with an artist, for instance, of gold with a goldsmith in order that he may make ornaments with it for the depositor, and *pratinyāsa*[7] which means a mutual bailment. that is, a deposit made in return for a deposit received. Out of these, the distinctions, which it may be useful to remember. are those between open and ascertained deposits and sealed deposits, and between deposits for safe custody, loans for use, and deposits with an artist, because these distinctions are based on real differences in the character of bailments, and they also give rise to some differences in the rights and liabilities of the parties. In the main, however, the incidents of these various kinds of bailments are very much the same.

The acceptance of a bailment is always an onerous undertaking ; and it seldom brings benefit to the bailee, for exccept in the cases of a loan for use where the bailee gets the benefit of using the thing for his own purposes, and perhaps also of a deposit with an artist where the bailment is a part of an entire transaction which is profitable to the artist, the bailee accepts the risk of keeping the deposit safe without getting any tangible benefit in return. Bṛhaspati, therefore, extols such an act as an act of merit, and says that whoever accepts a trust-deposit and keeps it with care does as meritorious an act as one who gives shelter to a person seeking protection. But, at the same time, he gives the warning that the destruction of a deposit out of negligence or greed is sinful as well as a

5. In the *Vīramitrodaya* commentary of the *Yājñavalkyasaṁhitā* (II. 67) it has been defined thus : Vivāhādyutsavārthaṁ vastrālaṁkārādikaṁ pratideyataỵāṅgīkṛtya yācitvānītaṁ yācitam.

6. In the Vīramitrodaya commentary of the *Yājñavalkyasmṛti* it is spoken of as *Nikṣepa* : śilpinelaṁkārādighaṭanāya dravyasamarpaṇaṁ ca sākṣād ākhyāya samarpaṇaṁ nikṣepaḥ.

7. We find definition of this in the commentary of Asahāya on *Nārada*, II. 14.
Vide also *Vyavahāramayūkha* of Nīlakaṇṭha : Pratinyāsaḥ svāminā yatra nikṣipta tenāsyānyatra niksiptam. p. 193,

source of disgrace, and one should, therefore, either refuse to accept a bailment, or having accepted it preserve it with care and returu it as soon as asked to do so.[8] But apart from these religious and moral considerations, the acceptance of a trust-deposit creates certain legal obligations supported by legal sanctions. It is not necessary for a Hindu lawyer to try to resolve this simple fact, *viz*, the accrual of legal obligatlons on the acceptance of a trust-deposit, into something finer than that, for he has not got to meet the difficulty of squaring it with the doctrine of consideration by bringing forward an artificial explanation such as that of an eminent English judge who had to contend that even in a gratuitous bailment there is a consideration, because the owner's trusting the bailee with the goods is a sufficient consideration to oblige him to a careful management. It is much simpler to say, as Bṛhaspati does, that you may not accept a bailment at all, but if you do, the very fact of your acceptance places you under certain responsibilities, for then you must preserve it with care and return it on the first demand. Stated shortly, it is the trust accepted by the bailee which is the ground of his obligations, and not by any consideration proceeding from the bailor in reposing the trust in him.

I shall now procced to explain the duties of the bailee on accepting the bailment and the penalties for their breach. The first duty of the bailee is to preserve the property placed in his hands, with proper care and if the property, while in his hands, is lost or destroyed for want of such care, he must compensate the bailor.

The measure of proper care which the Hindu law requires form the bailee is the care which he exercises for his own goods, so that the usual test is, that if along with the goods

8. Dadato yad bhavet puṇyaṁ hemakūpyambarādikam/
Tat syāt pālayato nyāsaṁ yathaiva śaraṇāgatam//
Bhartur drohe yathā nāryāḥ puṁsaḥ putrasuhṛdbadhe/
Doṣo bhavet tathā nyāse bhakṣitopekṣite nṛṇām/
Nyāsadravyaṁ na gṛhṇīyāt tannāśas tv ayaśaskaraḥ/
Gṛhītaṁ pālayed yatnāt sakṛd yācitam arpayet//
Bṛhaspati, II. 7-9.

entrusted with the bailee, his own goods are also lost or destroyed, then the loss must be suffered by the bailor without complaint, for he ought not to expect more care from a gratuitous bailee than what that person exercises for his own goods. Similarly, the bailee cannot be held responsible when the loss or destruction of the property entrusted to his care happens through an agency over which he had no control, that is to say, as our law-givers succinctly put it, through an act of the king or an act of God. I have had occasion to refer to these two expressions in dealing with the law of pledge. An act of God means such unforseen accidents as fire, flood etc ; an act of the king means a wanton act of oppression proceeding from the king. Our law-givers, you will thus observe, did not pretend to think that the king could do no wrong, and they had not learnt the sophistry of describing the king's own acts, when they were wrong, as the acts of his enemy. I should also mention that in regard to a bailment, theft was placed by our law-givers in the same category as an act of God, so that if the property deposited was lost by theft, the bailee was exempted from liability in the same way as if the property had been destroyed by fire or carried away by flood. It may, however, be observed that while exonerating the bailee from responsibility when along with the property deposited, the property of the bailee was lost or destroyed, or when the loss or destruction resulted from an act of the king or an act of God including theft, the Hindu law-givers were acute enough to perceive that a dishonest bailee, if so disposed, could create an apparent excuse with an eye to his own benefit by fraudulent means. Hence, Nārada, when saying that the loss falls upon the bailor when his goods are lost or destroyed along with the goods of the bailee, or when it arises from an act of the king or an act of God, in the same breath adds the qualification : "provided it does not arise from the tortuousness of the bailee."[9] It will thus appear that the bailee is relieved from

9. Grahītuḥ saha yo'rthena naṣṭa eva sa dāyinaḥ/
Daivarājakṛte tad van na cet taj jihmakāritam// *Nārada*, II. 9.
Vide also Arājadaivikenāpi vikṣiptaṁ yatra nāśitam/
Grahītuḥ saha bhāṇḍena dātur naṣṭaṁ tad ucyate//
Kātyāyana, 598.

responsibility on account of loss or destruction of the thing deposited when it happens in spite of his exercising the proper amount of care, or through what we may call, adopting an expression from the Roman Law, a *vis major*. Therefore, if charged for the loss or destruction of the deposit, it will be a sufficient defence for the bailee if he can show that he exercised as much care over it as over his own things, or that the loss or destruction was due to an extraneous agency over which he had no control.

As regards the quantum of care required, it does not appear that it made any difference in the Hindu Law whether it was a case of a gratuitous bailment for mere custody or of a loan for use, for in each case the measure of proper care was the same, being the amount of care which the bailee used to bestow upon his own property. In the case of a bailment for mere custody in which the benefit was entirely on the side of the bailor, there was a special rule which, I think, did not apply to the case of a loan for use, to the effect that if a bailor, being aware that the bailee used to lose his own goods from carelessness, still chose to entrust him with his own goods, then he could not hold the bailee responsible even if he lost them out of carelessness, for in such a case it should be presumed that the bailor knowingly accepted the risk of the goods deposited being lost by the carelessness of the bailee. The text of Kātyāyana on which this rule is based[10], although cited by the *Vīramitrodaya*, is not noticed by the author of *Mitākṣarā* and some other commentators, but I do not think that this can be regarded as a sufficient ground for regarding it as spurious, for it is not unusual to find some commentators citing more texts than others; and moreover, the text itself is not only not inconsistent with the general rule that one should use as much care in protecting things entrusted to him as he does in relation to his own property, but may, in one sense, be said to be almost a deduction from that rule, since a person who is, to the knowledge of the bailor, careless about his own property,

10. Jñātvā dravyaviyogan tu dātā yatra vinikṣipet/
Sarvopāyavināśe'pi grahītā naiva dāpyate// *Kāt.* 599.

may be excused if he proves no better about the property of the bailor placed in his hands, and the bailor himself cannot complain, for he ought to have expected as much. However that may be, the general rule seems to be that the Hindu law requires that the bailee should exercise as much care in protecting things entrusted to him as he does in relation to his own property, and he cannot be held responsible for the loss or destruction of the thing deposited simply because someone more careful than himself might have avoided or averted it.

Comparing these provisions, then, with those of the Roman Law, we find that according that system the extent of responsiblity was not the same in the cases of a loan for use and a bailment for mere custody. Thus, with reference to a loan for use, which is known as *Commodatum* under the Roman Law it is stated in the *Institutes of Justinian* that "he who has received a thing lent for his use, is indeed bound to employ his utmost diligence in keeping and preserving it ; not will it suffice that he should take the same care of it, which he was accustomed to take of his own property, if it appears that a more careful person might have preserved it in safety ; but he has not to answer for loss occasioned by superior force or extraordinary accident, provided the accident is not due to to any fault of his". On the other hand with reference to a deposit, by which is meant a gratuitous bailment for mere custody, it is there stated that "a person with whom a thing is deposited......is only answerable if he is guilty of fraud, and not for a mere fault, such as carelessness or negligence ; and he cannot, therefore, be called to account if the thing deposited, being carelessly kept, is stolen. For he who commits his property to the care of a negligent friend should impute the loss to his own want of caution".[11] It will thus appear that in the case of a loan for use the Roman Law seems to require more care to be execised by the bailee than the Hindu Law, whereas in the case of a gratuitous deposit it seems to require less. The provisions of the Roman Law seem to have been based on the following considerations : a

11. Institutes Lib, III. Tit : XIV.

person who takes a loan of a thing for use (*commodatum*) derives some benefit from the loan, while the lender does not get any, for the transaction is entirely gratuitous. Hence the Roman Law ordains that in such a case the borrower must use extreme care to keep the thing safe. On the other hand, in the case of a bailment for mere custody (*depositum*), the benefit is entirely on the side of the depositor, and hence the bailee should not be held responsible unless he is guilty of fraud. Turning now to the Hindu law, we find that the standard of care required is not an abstract standard, but a concrete and relative standard which makes allowance for the differences in human capacities, provided there is no wilful default. It may be pointed out that in the case of partnership (*societas*), the Roman law allows that the fault of a partner in dealing with partnership properties 'is not to be measured by a standard of the most perfect carefulness possible, and that it is sufficient that he should be as careful of things belonging to the partnership as he is of his own property, for he who accepts as partner a person of careless habits has only himself to blame'.[12] Now, having regard to this argument, may we not say that a person does not usually lend his property gratuitously for use to another man unless there exists some sort of friendship or close acquiantance between them, and that being so, the lender ought to know whether the borrower is ordinarily of careful habits or not, and if knowing that, he thinks it fit to accommodate his friend, he ought not to complain if his friend takes as much care of the articles lent as he does of his own things, and no more ? I cannot, therefore, say that the standard laid down by the Hindu law is unfair or unjust, and if anybody be not satisfied with it, there is nothing to prevent him from entering into a special contract before he lends his things. As regards a mere deposit, the Roman Law holds the depository liable only for fraud, and any amount of carelessness on his part is excused on the ground that 'he who commits his property to the care of a negligent friend should impute the loss to his own want of caution'. It seems

12. Institutes Lib, III Tit XXV.

to me that the rule of the Hindu law is on this point more reasonable and just. The ground set forth above to justify the rule of the Roman law assumes that the depositor is aware of the careless habits of the depository, but he could only be aware of this, if the depository had, on previous occasion, been found careless about his own things. In such a case Kātyāyana's text quoted by me shows that even the Hindu law made an exception to the general rule. But in other cases, where the depositor, judging from the previous habits of the depository, could not know that the latter was peculiarly careless about his own things, it would not be unreasonable to require that having accepted a deposit the depository should take as much care of it as he did of his own things ; at all events, in a case like this, the ground that 'he who commits his property to the care of a negligent friend should impute the loss to his own want of caution' cannot apply, and the rule of the Roman law must be defended, if possible, on some other ground than what the Institutes suggest. The idea which really pervades the rule of the Roman law seems to be that whoever takes charge of another's property without any remuneration or other kind of benefit need not take as much care of it as he does of his own, or, at any rate, he ought not to be held accountable if he does not. Nay, the rule goes to the length of absolving the depository altogether from all responsibility for mere carelessness, for he cannot be held responsible for anything short of fraud. It seems to me that the standard laid down by the Hindu law that a person should take as much care of things entrusted to him as he does of his own is more consonant with our moral sense than the rule of the Roman law ; as the Hindu law-givers point out, you may not accept a bailment if you like, but if you do, you should not make any distiction between your own property and the property so committed to your care. A person, who after taking charge of another's property without demur afterwards bestows very little care upon it simply because it is not his own, may be absolved from responsibility by the technical rule of the Roman law, but will, I hope, be not similarly absolved by the

moral consciousness of any civilised community. It may be said that legality and morality do not often agree. That may be true but there can be no harm if in a case like this they do. As regards the rule that a bailee cannot be held accountable if the loss or destruction of the property results from some uncontrollable external agency, both the Hindu and the Roman systems agree, and, as I shall show, there are resemblences in other respects also.

Turning now to the Common Law of England, it appears from the luminous account given by Mr. Justice Holmes that the liability of the bailee was originally much more rigorous than under either the Hindu Law or the Roman Law. The old Common Law rule was that when the bailor's goods were placed in the bailee's hands, the latter was bound to hold the former harmless, and if the goods were lost, it was no excuse to say that they were stolen without his (bailee's) fault. Thus it was laid down in the case of Southcote v. Bennet that delivery to a bailee chargeth him to keep at his peril, and it was no plea that he was robbed, and Lord Coke added "That *to keep* and to keep safely are one and the same thing." It should be observed that Southcote's case did not recognise any distinction between a paid and an unpaid bailee, although in a subsequent case Popham C. J. sought to draw a distinction between the two, and differentiate the extents of their liability. Gradually, however, the rigour of the old Common Law has been relaxed, but a remnant of it still lingers on the special liability of the inn-keepers and common carriers, which is now supposed to be an exception introduced by the custom of the realm, but is regarded by Mr. Justice Holmes to be a survival of ancient law regarding the general liability of the bailee. However that may be, the overthrow of the rule deducible from Southcote's case may be said to date from the decision in Coggs *v.* Bernard, in which Lord Holt, being under the impression that the Common Law of bailment was derived from the Roman law, assimilated it, as far as possible, to the rules laid down by the system. In that case Lord Holt distinguished between bailee for reward exercising a common calling and other bailees, and held that

the bailees of the former class incurred a special liability by reason of their exercising a common calling for remuneration, but, at the present day, the principle of common employment has been given up, and the special liability is only confined to common carriers and inn-keepers, which remains, as Mr. Justice Holmes puts it, as a merely empirical exception from the general doctrine, in so far as they cannot claim any immunity unless they can make out that the loss or damage was due to an act of God or an act of the public enemy. That being the history of the English Common Law, it seems to me that the ancient Hindu Law regarding the liability of the bailee was much more reasonable than the ancient Common Law. Indeed, as Mr. Justice Holmes points out, the peculiarity of the old English Law upon the point was due to a peculiarity of procedure under which the remedy for wrongful appropriation by a third person of property committed to the care of a bailee was exclusively in his hands, and hence he was held responsible to the bailor whether the loss or destruction of the property was due to his fault or not. In course of time, the right to sue was extended to the bailor, but the old view regarding the strict liability of the bailee still lingered, until the law was gradually changed and assimilated to the Roman law.

Let us now revert to the main subject of our discussion. I have explained the grounds on which a baille may claim immunity from liability on account of loss or destruction of the property placed in his hands. Where these grounds do not exist, the bailee is liable to compensate the bailor for his loss; but it ought to be mentioned that the Hindu law recognises that the bailee may not be equally blamable in every case. Thus the loss or destruction of the property committed to the care of the bailee for which he is accountable may arise in either of three ways: (1) The bailee may have consumed the property himself; (2) he may have allowed it to be lost or destroyed through his negligence; or (3) the loss or destrution may have happened through a mistake on his part which ought not to have occurred. In the first case, the property is said to have been *prabhakṣita*

or consumed, in the second, *upekṣita* or neglected, and in the third *ajñānanāśita* or destroyed through mistake.[13] It is apparent that you cannot impute the same amount of blame to the bailee in these cases, and, taking this into consideration, the Hindu law has adjudged that the measure of compensation payable by the bailee should vary according to the extent of blame imputable to him. Thus it has been laid down that where the bailee has himself consumed the property placed in his hands, he shall have to pay its price together with interest; where it has been lost or destroyed through his negligence, he shall have to pay a sum equal to its price (without interest); and where the loss is attributable to a culpable mistake on his part the compensation shall amount to a little less than its property value, allowing, according to the *Mitākṣarā*, a deduction of one fourth. Apart from this, a person who consumes a property committed to his care, or uses it for his own profit without the permission of the owner renders himself liable to punishment. It may be added that in the case of a deposit delivered under a sealed cover, the bailee is not at all responsible if somehow or other it becomes spoiled within the cover, but he becomes liable if he breaks the seal and uses any part of the deposit for his own purpose.

The next duty of the depository is to return the thing deposited as soon as asked to do so; if he fails to do so, then he becomes answerable for any subsequent loss of the deposit even if it happens from an act of the king or an act of God[14]. In other words, although a depository cannot ordinarily be held liable for the loss of the deposit if it be due to some uncontrollable agency, yet this defence ceases to be available

13. Nyāsādikaṁ paradravyaṁ prabhakṣitam upekṣitam/
Ajñānanāśitaṁ caiva yena dāpyaḥ sa eva tat//
Bhakṣitaṁ sodayaṁ dāpyaḥ samaṁ dāpya upekṣitam/
Kiñcin nyūnaṁ pradāpyaḥ syād dravyam ajñānanāśitam//
Kāt. 517.

14. Yācanānantaraṁ nāśe daivarājakṛte'pi saḥ/
Grahītā pratidāpyaḥ syān mūlyamātraṁ na saṁśayaḥ// *Vyāsa*,
Quoted in Vī. Mitr : Pratyarpaṇavilambamātrāparādhe savṛddhikadānasyānyāyyatvāt. *Vīr. Mitr.* p. 283.

to him if at the time when the demand was made for the return of the deposit he could have returned it but did not do so without any excuse. In such a case it was the duty of the depository to return the deposit as soon as he was asked to do so, and if he omitted to do it he did so at his peril, so that no excuse based upon any subsequent accident could be listened to. Vyāsa, however, remarks that if the loss arises from an act of the king or an act of God, the depository should not be called upon to pay more than the price as compensation, and this, as the *Vīramitrodaya* observes, is proper, since it would be hard to force him to pay more when his only fault was the delay in returning the deposit after demand. To this rule requiring the bailee to return the thing committed to his care as soon as a demand is made, the Hindu Law recognises an exception in the case of a loan for use, for it lays down that if a person obtains a thing from another for using it on a particular occasion, or for a particular period of time, then he cannot be held guilty if he does not return the thing before that particular occasion or within that particular period of time, when his work is half finished although the lender asks for its return.[15] Curiously enough, the Roman Law also recognises a similar distinction, for while it lays down that a depositor may reclaim the deposit whenever he pleases, a *commodans* (i. e. a lender for use) must wait for the expiration of the time agreed on. The Hindu Law, however, attaches an exception to the above exception, for it says that if it so happens that some work of the lender will suffer if he has to wait till the expiration of the time agreed on, then the borrower should return the thing borrowed although his work has only been half finished.[16] This seems reasonable, since in the case of a gratuitous loan it is but fair that the work of the lender should not suffer even at the cost of some inconvenience to the borrower. In the case of articles deposited with an artist in order that he may exercise his

15. Yadi tatkāryaṁ uddiśya kālaṁ pariniyamya vā/
Yācito'rdhakṛte tasminn aprāpte na tu dāpyate// *Kāt*, 606.

16. Atha kāryavipattis tu tasyaiva svāmino bhavet/
Aprāpte vai sa kāle tu dāpyas tv ardhakṛte'pi tat// *Kāt*, 609.

workmanship upon it, the artist should complete his work within the appointed time ; if he does not, then he shall be responsible for a subsequent loss however it may arise. More-ever, if the article is damaged during the progress of the work, then, if it happens owing to some defect in the article, the artist shall not be responsible for it ; but it will be otherwise, if the damage is due to some fault on the part of the artist.

As regards the manner of returning a deposit, it is laid down that it should be returned in the same way as it was taken. Thus, when a property has been deposited by a certain person, it is the duty of the bailee to return it to him, and Bṛhaspati takes care to add that the bailee should not make it over to any person other than the bailor, although he may claim to be the owner of the thing, nor even to the sons or other close relations of the bailor, so long as he is alive.[17] This corresponds to the principle of estoppel applicable to the case of a bailment as laid down in Sec. 116 of the *Indian Evidence Act*. Then, again, where there has been a mutual deposit, the return should also be mutual.[18] When, however, the bailor is dead, the bailee should return the deposit to the heirs of the deceased bailor, but if there be several such heirs, the return should be made in the presence of all of them.

As in the case of a gratuitous bailment, the bailee does not derive any benefit from the task undertaken by him, he is ordinarily free to return the thing deposited at any time he p eases, even before the bailor asks for it ; but then, where

17. Sthāpitaṁ yena vidhinā yena yac ca vibhāvitaṁ/
Tathaiva tasya dātavyaṁ adeyaṁ pratyanantaram//*Bṛhaspati*,XI.10.
Mitramiśra by way of making reference to Devaṇabhaṭṭa explains :
Sthāpaketarasya yasya sthāpitadravyasvāmyam asti sa iha pratyanantara ucyata iti *Smṛticandrikāyām*. Pratyanantare putrādāv iti *Kalpatarau*.

18. Yo yathā nikṣipedd haste yam arthaṁ yasya mānavaḥ/
Sa tathaiva grahītavyo yathā dāyas tathā grahaḥ// *Manu*, VIII. 180,
Mitho dāyaḥ kṛto yena gṛhato mitha eva vā/
Mitha eva pradātavyo yathā dāyas tathā grahaḥ// Ibid, VIII.195.
Samudre nāpnuyāt kiñcit yadi tasmān na saṁharet// Ibid.VIII.188.
Mitramiśra explains: Etad uktaṁ bhavati sasākṣitvena sthāpitaṁ sākṣisamakṣam grahītavyam, rahasi sthāpitaṁ rahasy eveti.

the deposit was made out of fear for some anticipated danger, the bailee should not, if he were aware of the motive which induced the deposit, return it until the danger was over. Such a return is called premature, *Kālahīna*,and the bailee who makes such a return againt the wishes of the bailor renders himself liable to be punished with a fine, if, in consequence, the bailor suffers any loss.

In a proper case, and at the proper time, the king will enforce the return of the deposit, if the bailee does not return it of his own accord, and, furthermore, he who denies a deposit made with him and he who falsely claims to have made a deposit with another and demands its return should both be punished by the king.

I shall now give a short account of some incorporeal rights recognised by the Hindu Law which have not found a place in the discussions contained in this and in the previous lectures, and with this I shall conclude this lecture as well as the Part dealing with the Law of Things. We do not find any lengthy discussion about these rights in the Hindu Law, and I shall, therefore, content myself with merely indicating their nature as disclosed in the works on Hindu Law.

The first right of this kind to which I may advert is the right of pasturage. The importance of this right to an agricultural people can hardly be denied, and hence we find our lawgivers making provisions for the maintenance of pasture-grounds in or around every village which may be used by the villagers in general for grazing their cattle on. So Yājñavalkya declares that in every village there should be land set apart for pasturage either by the common consent of the villagers, or by a special order of the king.[19] This seems to imply that if the villagers could not agree among themselves, then the king should interfere and compel the villagers to make proper provision for pasturage by setting apart sufficient land for that purpose. The proper

19. Grāmyechayā gopracāro bhūmirājavaśena vā : *Yāj.* II. 166.

Vijñāneśvara explains : grāmyecchayā, gramyajanecchayā bhūmyalpatvamahattvāpekṣayā rājecchayā vā gopracāraḥ kartavyaḥ. Gavādīnāṁ pracāraṇārthaṁ kiyān api bhūbhāgo'kṛṣṭaḥ parikalpanīyaḥ ity arthaḥ.

measure of the land which ought to be set apart for this purpose is also stated by Yājñavalkya, for he says, that between a village and the culturable fields a space measuring four hundred cubits should be reserved for grazing purpose. In the case of a *kharvaṭa* (which according to one interpetation means a village inhabited by many artificers and husbandmen, and according to another intepretation means a village abounding in thorny shrubs) the space left should measure eight hundred cubits, and in the case of a city, sixteen hundred cubits'.[20] From a text of Manu bearing upon this point it seems that the space for pasturage used to be kept in the form of a belt or enclosure around the village on all sides which separated the inhabited portion of the village from the cultivated lands attached to it[21] ; and it was utilised by all the villagers for grazing their cattle on. Those who have read Sir Henry Maine's 'Village Communities' will remember how he makes use of the custom of setting apart pasture-lands for the common use of all the villagers in support of his theory that individual ownership has gradually grown out of communal ownership or joint ownership of the whole community. I cannot say that there may not be a good deal in this argument, but I should point out that the explanation given by Yājña-valkya presupposes *individual ownership* as distinguished from joint ownership of all the villagers over all the lands of the village ; for he says that 'lands are set apart for pasturage by the wish of the whole village or by the control exercised by the king',[22] a position which seems to me to be incompatible with the supposition that all the lands in and around the village belonged jointly to all the villagers, for, if it were so, it would be necessary to specialise the fact that a common

20. Dhanuḥśataṁ parīṇāho grāme kṣetrāntaraṁ bhavet/
Dve śate kharvaṭasya syān nagarasya catuḥśatam// *Yāj.* II.167.
Vijñāneśvara explains: Grāmakṣetrayor antaraṁ dhanuḥśataparimitaṁ parīṇāhaḥ sarvatodiśam anuptasasyaṁ kāryam. Kharvaṭasya pracurakaṇṭakasantānasya grāmasya dve śataṁ parīṇāhaḥ. Nagarasya bahujanasaṁkīrṇasya dhanuḥṣāṁ catuḥśataparimitam antaraṁ kāryam.

21. Dhanuḥśataṁ parīhāro grāmasya syāt samantataḥ.
Manu, VIII. 237.

22. Grāmyecchyā gopracāro bhūmī rājavaśena vā, *Yāj.* II. 166.

pasture-ground was set apart by the common consent of all the villagers, or, when that could not be secured, by the special interference of the king. Of course, it may be said, and I consider this to be a very plausible hypothesis, that originally the custom of setting apart some lands for pasturage at the outskirts of the village had its basis on communal ownership, but that when in Yājñavalkya's time that kind of ownership had been superseded by individlual or rather family ownership, the only explanation which could be put forward to account for the existence of these common pasture-grounds was that they must have been set apart either by the common consent of the villagers or by an order from the king. But what I wish to impress upon you is that our *Dharma-śāstras* had long out-grown the stage of communal ownership, so that even in explaining phenomena which might be considered to be relics of the old system, they proceeded upon the assumption of a new order of things based upon a new system of holding lands.

Let us now turn our attention to the right of way. The primary distinction which we have got to consider with reference to this subject is between public way and private way. The right of way over private lands is recognised in a text of Śaṁkha and Likhita which is thus explained and amplified by the *Vīramitrodaya* : 'whoever constantly passes through a field or by its side should not be obstructed'. It is not stated how long this user must continue in order to render its obstruction improper, but I take it that the user must be long enough and frequent enough to be considered a constant and customary user in order to make it improper on the part of the owner to interfere with it. A public way is divided into three classes : *Saṁsaraṇa* i.e. highway, *Catuṣpatha* i.e. public thoroughfare, and *Rājamārga* i.e. king's highway. A *Saṁsaraṇa* or highway is defined as the way over which men and beasts pass and repass without interruption, and it is declared that no one should obstruct it in any way.[22a] A

22 a. Yānty āyānti janā yena paśavaś cānivāritāḥ/
Tad ucyate saṁsaraṇaṁ na roddhavyaṁ tu kenacit//Bṛhaspati, XIX.51. Tathā ca samyaganivāritaṁ saranty asminn iti saṁsaraṇanirvacanam ity arthaḥ Vīr. M. p. 364.

Catuṣpatha or public thoroughfare is described as the way over which all people without any distinction pass and repass at all times, and a *Rājamārga* or king's highway is said to be a way which is ordinarily open to the public at particular hours, but may be closed by the king's officers at other times.[23] It, however, appears from a text of Śaṁkha and Likhita that a king's highway should not be so closed as not to leave room enough for the turning of a chariot.[24] It is not unlikely that the power reserved for the king's officers to stop a king's highway at certain periods was intended to enable them to collect tolls from the frequenters of the way at those times, but this is a mere guess and I cannot lay much stress upon it. It declared that 'no one should by throwing filth or making a platform, a ditch, an aqueduct, or eaves of a house obstruct a public thoroughfare, a place of worship, and a king's highway',[25] and whoever does so renders himself liable to punishment.[26] It may be curious to notice that Manu declares that whoever discharges excrement on a highway save under extreme necessity shall be liable to pay a fine, and also to remove the filth, but in the case of a person under distress, an old or a pregnant woman, and a boy, it is directed that the fine should be remitted for a warning.[27]

23. Sarve janāḥ sadā yena prayānti sa catuspathaḥ/
Aniṣiddhā yathākālaṁ rājamārgaḥ sa ucyate//*Kāt*, 755.
Vīr. Mit. Yatra rājakīyair akāle gamanaṁ pratiṣiddhyate sa rājamārga ity arthaḥ. p. 364.

24. Mārgakṣetre pathivisargo rājamārge rathasya parivartanam :
Vīr. Mit : Rājamārge yāvatā pradeśena rathaḥ parivarteta tāvān pradeśas tyaktavyaḥ ity arthaḥ. p. 365.

25. Avaskarasthalaśvabhrabhranasyandanikādibhiḥ/
Catuspathasurasthānarājamārgān na rodhayet//*Nārada*, XI. 15.
Vīr. Mit : Avaskaraḥ purīṣam : Gṛhādiśodhanārthaṁ pāṁśusamūha iti *Hariharādayah*. Sthalaṁ vedikā, Svabhraṁ gartaḥ : bhraṇo jalanirgamamārgaḥ, Syandanikā paṭalaprāntaḥ. p 364.

26. Yas tatra saṅkaraṁ śvabhraṁ vṛkṣāropaṇam eva ca/
Kāmāt purīṣam kuryāc ca tasya daṇḍas tu māṣakaḥ//*Bṛhaspatiḥ*, XIX. 52.

27. Samutsṛjet rājamārge yas tv amedhyam anāpadi/
Sa dvau kārṣāpaṇau dadyād amedhyaṁ cāśu śodhayet//
Āpadgatas tathā vṛddhā garbhiṇī bāla eva ca/
Paribhāṣaṇam arhanti tac ca śodhyam iti sthitiḥ//*Manu*, IX.282-3.

Besides these, there are certain other incorporeal rights, chiefly appurtenant to the tenement occupied by a person, which, according to the Hindu Law, must not be interfered with. Thus it has been declared that the particular mode of enjoyment of a house and its doors, and of a market, or the like, dating from the first entry by the enjoyer must not be disturbed. So also, a window, an aqueduct, a raised platform, the eaves of a house must be allowed to remain as they have existed from the very begining, but an intermediate structure interfering with another person's enjoyment of his own lands may be objected to. Similarly, a right of support for one's existing structure seems to have been recognised in the direction that no one should so act as to endanger the foundation of another's house. It is also laid down that no one should open a window overlooking, or a new water-course discharging its water into, another's house ; of course, when they have existed from before they may remain as they are. The prohibition to open a new window overlooking another's house seems to have been based on the right of privacy of the owner of an adjacent house.

I think I have said enough to give you an idea of the variety of rights recognised by the Hindu Law regulating the relations between owners of adjacent lands. I shall now give you some instances where certain interferences with another's proprietary right are permitted by the Hindu Law in consideration of greater benefit expected to arise therefrom both to the owner and to his neighbours. Thus Yājñavalkya says : 'an embankment which is beneficial to the people should not be prohibited by the owner of the soil, where the inconvenience is slight, and similarly, a well which occupies a little space, and supplies abundance of water[28]. To the

Compare : Taḍāgodyānatīrthāni yo'medhyena vināśayet/
Amedhyaṁ śodhayitvā tu daṇḍayet pūrvasāhasam//*Kāt*, 758.
Dūṣayet siddhatīrthāni sthāpitāni mahātmabhiḥ/
Puṇyāni pāvanīyāni prāpnuyāt pūrvasāhasam//*Kāt*, 759.

28. Na niṣedhyo'lpabādhas tu setuḥ kalyāṇakārakaḥ/
Parabhūmiṁ haran kūpaḥ svalpakṣetro bahūdakaḥ//*Yāj*. II. 156.

Vīr. Mit : Ābhyāṁ viśeṣaṇābhyāṁ yaḥ setuḥ kṣetramadhyavartitayā bahupīḍākaro nadyādisannihitakṣetravartitayā alpopakārako vā tadā niṣeddhavya iti darśitam. p. 367.

same effect is the text of Nārada which runs as follows: 'a reservoir in the middle of another man's field shall not be objected to by the owner, if the benefit is great and the damage small, since profit is to be desired even at the cost of a trifling loss'[29]. It is, however, directed that before raising embankment or excavating the well the permission of the owner of the soil should, if possible, be obtained.[30]

I shall now conclude this lecture by mentioning to you some peculiar rights recognised by the Hindu Law which may seem to us strange, but were allowed in ancient time as being suitable to the condition of the people in those days, and not opposed to their feelings and sentiments. Thus if the owner of a field was dead, long absent, or otherwise incapable of cultivating it, then a stranger might, unless prohibited from doing so, till the field and appropriate the produce. If, in the meantime, the owner returned or otherwise recovered his capacity, and demanded the land back, then he was required to pay to the stranger the expenses incurred by him for preserving the land from turning into a waste; and, if he were unable to pay the same, then the stranger could keep the land in his possession until he could recoup himself from the usufruct; but even during this time the owner was to receive a certain portion of the produce as his share, and the reminder was to be taken by the cultivator in satisfaction of the expenses incurred and labour bestowed by him. It may be said that if I allow my land to lie waste, it is nobody else's business to interfere with it. That may, indeed, be our modern idea. But having regard to the condition of the people in ancient time, I cannot say that the legalisation of this sort of action, which was not prejudicial to the interest of the owner, but was rather beneficial to him was improper or unreasonable. The last right which I shall mention was the right accorded to a person belonging to the twice-born classes to take fuel and fruits and flowers for the performance of religious rites from another

29. Parakeṣetrasya madhye tu setur na pratiṣidhyate/
Mahāguṇo'lpadoṣaś cet vṛdhīr iṣṭā kṣaye sati. *Nārada*, XI. 17.

30. Svāmine yo'nivedyaiva kṣetre setuṁ pravartayet/
Utpanna svāmino bhogas tadabhāve mahīpateḥ// *Yāj*, II. 157.

person's land. But in the case of fruits there was this limitation that they could not be taken from trees which were enclosed by owner within fences. These minor rules may not have much value to a student of modern law, but I mention them here in order to show the spirit in which they were conceived by the sages and obeyed by the people.*

* Reference in this context is to be made to a highly informative article on *Deposits* by L. Sternbach, which previously appeared in the *Annals of the Bhandarkar Oriental Research Institute*, Vol. XXVI, Parts, III-IV, p. 263-282. Included later in Juridical Studies in Ancient Indian Law, (Delhi, 1965), pp. 26-108.

Special mention is to be made to the following topics :

Other kinds of Deposits—*Krayapreṣita* ; *Bandha* and *Vaiśyavṛttyarpita*—pp. 48 : Possession or detention—Persons suitable to become depositaries—pp. 52-53 ; Denial of receiving a Deposit—65-69 ; Use of the object deposited—69-70 : Usucapio, Praescriptio, Compensation and other cases—71 ; Contract of deposit in some non-juridicial sources in Classical Sanskrit—72-108.